UNITED STATES
CUSTOMS COURT REPORTS

VOLUME 78

CASES ADJUDGED IN THE
UNITED STATES CUSTOMS COURT

January–June 1977

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HJ 6604
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v. 78

UNITED STATES CUSTOMS COURT

Chief Judge

NILS A. BOE[1]
EDWARD D. RE[2]

Judges

PAUL P. RAO
MORGAN FORD
SCOVEL RICHARDSON
FREDERICK LANDIS
JAMES L. WATSON
HERBERT N. MALETZ
BERNARD NEWMAN
EDWARD D. RE[2]
NILS A. BOE[3]

Senior Judges

MARY D. ALGER[4]
SAMUEL M. ROSENSTEIN

JOSEPH E. LOMBARDI, *Clerk*
DANTE A. ROBILOTTI, *Marshal*

[1] To March 20, 1977.
[2] Designated Chief Judge, effective March 21, 1977.
[3] Effective March 21, 1977.
[4] Died March 5, 1977.

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ORDER

By virtue of the authority vested in me by Section 251, Title 28 of the United States Code, it is ordered as follows:

1. The Honorable Edward D. Re is hereby designated Chief Judge of the United States Customs Court, effective the twenty-first day of March 1977.

2. The Order dated September 28, 1971 designating The Honorable Nils A. Boe as Chief Judge of the United States Customs Court is hereby superseded.

JIMMY CARTER.

THE WHITE HOUSE
MARCH 9, 1977.

Investiture

of the

Honorable Edward D. Re

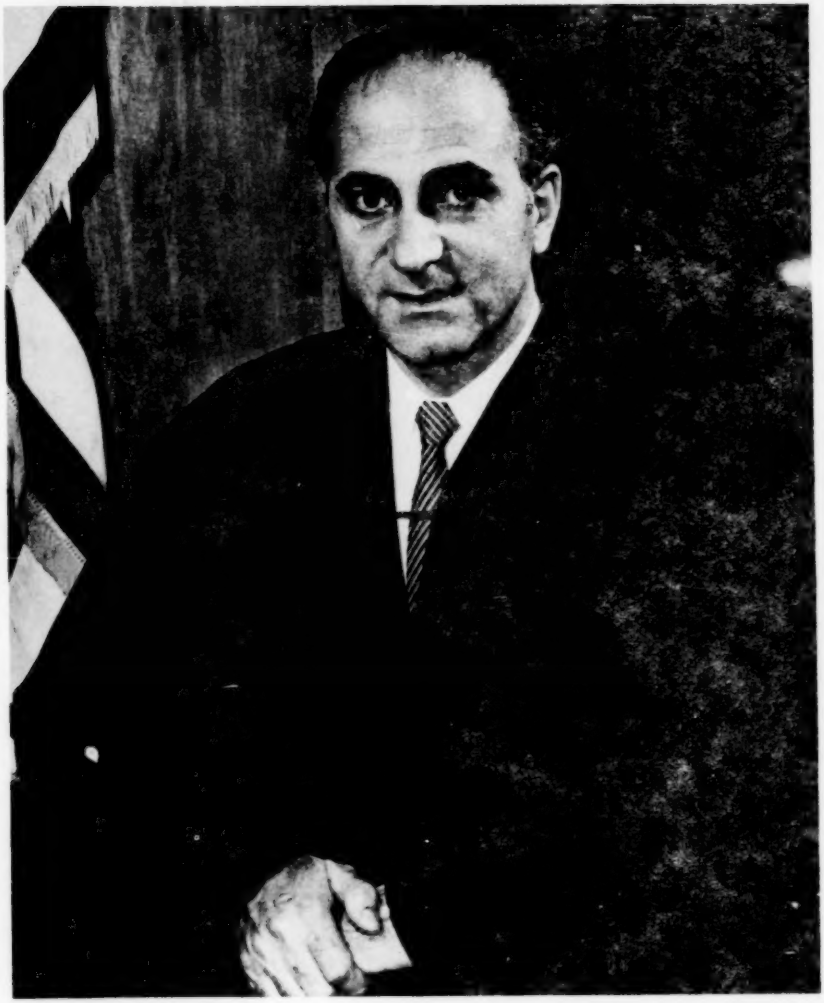
as

Chief Judge

United States Customs Court

May 27, 1977

(XI)



Honorable Edward D. Re

(XIII)

The United States Customs Court

Chief Judge

Edward D. Re

Judges

Paul P. Rao	James L. Watson
Morgan Ford	Herbert N. Maletz
Scovel Richardson	Bernard Newman
Frederick Landis	Nils A. Boe

Senior Judge

Samuel M. Rosenstein

INVESTITURE COMMITTEE

Judge Morgan Ford, *Chairman*

Judge Frederick Landis

Judge Bernard Newman

HONORABLE EDWARD D. RE

PROGRAM

PRESIDING:

The Honorable Warren E. Burger
The Chief Justice of the United States

WELCOME:

The Honorable Frederick Landis
Judge, United States Customs Court

INTRODUCTION of SPEAKERS:

The Honorable Howard T. Markey
Chief Judge, United States Court of
Customs and Patent Appeals

SPEAKERS:

The Honorable Griffin B. Bell
Attorney General of the United States

The Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary,
House of Representatives

The Honorable Dennis DeConcini
United States Senator from Arizona,
Senate Judiciary Committee

The Honorable Abraham D. Beame
Mayor of the City of New York

The Honorable Robert Carswell
Deputy Secretary of the Treasury

William B. Spann, Jr., Esquire
President-elect, American Bar Association

The Honorable Franco Foschi
Under Secretary of State, Ministry of
Foreign Affairs, The Republic of Italy

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PROGRAM

(continued)

Whitney North Seymour, Esquire
Past President, American Bar Association
Past President, Association of the Bar
of the City of New York

Ellsworth Qualey, Esquire
President, Association of the Customs Bar

INTRODUCTION of THE CHIEF JUSTICE
of the UNITED STATES:

Chief Judge Howard T. Markey

ADMINISTRATION of the CONSTITUTIONAL OATH
to CHIEF JUDGE RE:

The Honorable Warren E. Burger
The Chief Justice of the United States

RESPONSE:

The Honorable Edward D. Re
Chief Judge, United States Customs Court

Proceedings

MARSHAL ROBILOTTI: Please rise.

The Chief Justice of the United States, the Chief Judge of the United States Court of Customs and Patent Appeals, the Chief Judge and Judges of the United States Customs Court are now in Special Session. All persons having business before this Honorable Court, draw nigh, give your attention, and ye shall be heard. God save the United States and this Honorable Court.

JUDGE LANDIS: Mr. Chief Justice, Chief Judge Markey, my dear colleagues, distinguished guests, ladies and gentlemen: Although I am very happy to open this Investiture Ceremony, I regret to announce that because of temporary illness, Judge Morgan Ford, Chairman of the Investiture Committee, is not here with us. He had prepared a brief statement for this occasion which I should like to make on behalf of the Investiture Commitee and for the entire Court.

"On behalf of the Investiture Committee and the Court, may I extend to each of you a most cordial welcome.

"The Court now convenes in Special Session for the Investiture of The Honorable Edward D. Re as the ninth Chief Judge of this Court and the fifth Chief Judge to be honored from the State of New York. During the history of this Court, thirty-six Judges representing twenty states have been honored to serve as Judges of the Court. It may be of interest to you, General Bell, to know that the fourth Chief Judge of this Court, The Honorable William J. Tilson, came from your good State of Georgia.

"The Court is pleased to note that Judge Re's designation as Chief Judge was the first judicial appointment made by President Carter. That is, indeed, an honor in itself.

"Judge Re, the members of the Court salute you as the ninth Chief Judge of the Customs Court."

With us this afternoon, from Washington, to present the speakers for the Investiture is the distinguished Chief Judge of the United States Court of Customs and Patent Appeals. Since I am from Indiana,

PROCEEDINGS

I am happy to add that Chief Judge Markey is from the sister State of Illinois.

The Honorable Howard T. Markey.

CHIEF JUDGE MARKEY: Mr. Chief Justice, Chief Judge Re, distinguished Judges of the United States Customs Court, General Bell, Senator DeConcini, Chairman Rodino, distinguished guests, ladies and gentlemen.

Today's ceremony occurs, coincidentally, but most appropriately, as we observe World Trade Week.

The President of the United States, in proclaiming this week as World Trade Week, has asked all Americans to observe the occasion with ceremonies and other appropriate activities to promote continuing awareness of the importance of world trade to our country and to our relations with other nations of the world.

One of the essentials of a constitutional government is to provide for independent, impartial judicial tribunals to resolve controversies between individuals and the government. When disputes involving importations arise, the federal judicial system, through the United States Customs Court, provides protection for the individual against wrongful government action, and protects the government revenue when the occasion requires.

It is with great pleasure that I participate in these Investiture ceremonies. I shall have the opportunity to present the distinguished speakers who appear before the Court to join with us in the formal Investiture of a new Chief Judge of the United States Customs Court. Before doing so, may I acknowledge the distinguished Judges gracing this Bench who are colleagues of Chief Judge Re: Judge Paul P. Rao; Judge Scovel Richardson; Judge Frederick Landis; Judge James L. Watson; Judge Herbert N. Maletz; Judge Bernard Newman; Judge Nils A. Boe and Senior Judge Samuel M. Rosenstein. As you have heard, unhappily, Judge Morgan Ford is ill and can not be with us. We wish him a speedy recovery.

It is my first honor to introduce America's lawyer, a former Judge of the United States Court of Appeals for the Fifth Circuit, the distinguished Attorney General of the United States. The Honorable Griffin B. Bell.

ATTORNEY GENERAL BELL: Mr. Chief Justice, Chief Judge Markey, Chief Judge Re, distinguished members of the Bench and Bar, ladies and gentlemen.

HONORABLE EDWARD D. RE

May it please the Court: I bring greetings on behalf of President Carter. He asked me to say that it was a great pleasure for him to name Judge Re as Chief Judge of the Court, and I would like to add that one can hardly go wrong with two friends like President Carter and Chairman Peter Rodino. It is no wonder that this man has achieved such heights.

Judge Re is a scholar; he is a teacher; a writer; jurist; gentleman, and a great public servant. I have done some research on the Customs Service, and I find that the most important of those titles is "writer." Chaucer was in the Customs Service in the fourteenth century and, later, Robert Burns was employed in the Customs Service in Scotland. Nathaniel Hawthorne was also in the Customs Service prior to writing *The Scarlet Letter*. We know that Judge Re is a writer. As a matter of fact, at lunch, one of his daughters remarked that she had been taught for years to always say something about Judge Re's books.

(Laughter)

But if I may be permitted a personal word, I have known Judge Re for many years. We have been on programs together at the Appellate Judges' Seminars over the years at the Federal Judicial Center. I have long admired him as a brilliant, able person. It pleased me very much when the President named him as Chief Judge.

As Attorney General, I want to pledge the cooperation of the Department of Justice to this Court and, indeed, to all the courts.

There are two particular things that are noteworthy. There are some jurisdictional problems between the Customs Court and District Courts, and we will be working to solve those problems. Secondly, I would like to announce that for all special courts, in order to fill vacancies that may arise on the special courts, there will be a selection commission set up at a very early date. I have tried not to call these new commissions "merit selections" because I was appointed a Judge under the old system, and I always like to think that there was some merit involved in that.

(Laughter)

It is a great pleasure for me to be here and I bring you the best wishes of all in the Justice Department.

CHIEF JUDGE MARKEY: Thank you, Mr. Attorney General.

It is my distinct pleasure and special honor now to introduce the renowned and distinguished Chairman of the Judiciary Committee of the House of Representatives, who is in his 28th year of dedicated

service, not only to the people of his district, but to all Americans, The Honorable Peter W. Rodino.

CHAIRMAN RODINO: Mr. Chief Justice, Chief Judge Markey, Chief Judge Re, distinguished members of the Bench and Bar, ladies and gentlemen.

May it please the Court: It is for me truly a great and singular privilege to be among so many distinguished Americans this afternoon, paying tribute to and saluting an individual who personifies what we in America must truly be grateful for, and that is a reflection of all that is typically American and best in America. I think it is all reflected in the man who today is being invested as Chief Judge of the United States Customs Court, Judge Edward D. Re; a man whom I am privileged to call a friend; a man who is known as a scholar and educator; a man who is a jurist; a man who, indeed, before he was any of these was an immigrant, and that makes him typically American in this beautiful land of immigrants.

His career is typically American because it relates the great American dream of an immigrant who now sits on the Federal Bench of these United States of America, dispensing what is again looked upon by the people of the world as a system of justice which gives to all of us a sense of great pride.

Chief Judge Re has within him attributes of fairness, of decency, of compassion. He brings these feelings as an immigrant from a land that has these great virtues and merged them with the great concepts that we find here in America in the system of laws that has stood the test of time.

Chief Judge Re will continue to reflect all of this and, today, Judge Re, let me say to you as my friend, that I consider it a great privilege and honor to be here as you are invested because, again, it demonstrates to me and to millions of others how the American dream can be realized.

I salute you and I know that your career, which has already been illustrious, will be one that will reflect even greater credit to this Bench. Thank you very much.

(Applause)

CHIEF JUDGE MARKEY: Thank you, Chairman Rodino.

HONORABLE EDWARD D. RE

The Court is pleased to hear now from one of the newest members of the United States Senate, who has already set a course of distinguished public service. Recently designated as Chairman of the Senate Judiciary Subcommittee on Improvements in Judicial Machinery, representing the Senate Judiciary Committee of which he is a member. The Honorable Dennis DeConcini of Arizona. Senator DeConcini.

SENATOR DeCONCINI: Mr. Chief Justice, Chief Judge Markey, Chief Judge Re, Mrs. Re and the family, distinguished members of the Bench and Bar and, particularly, the Attorney General and Chairman of the Judiciary Committee, and your fine Mayor, ladies and gentlemen:

May it please the Court: It is my distinct pleasure to bring to you today the greetings of Chairman Eastland of the Judiciary Committee. He asked me to extend to you, Judge Re, his congratulations and sincerest best wishes.

Peter Rodino mentioned the "American dream" and, indeed, that is what we have before us today. Edward D. Re is an example of that great American dream.

Edward Re worked his way through the New York public schools, as many of you know, and St. John's University, where he obtained a Bachelor of Science Degree *cum laude* in 1941. He then continued his education at law school at St. John's University on an academic scholarship, graduating *summa cum laude*, the valedictorian of his class.

It is appropriate to reflect for a few moments on Edward Re's outstanding record. He served as Special Hearing Officer for the Department of Justice in conscientious objector cases, and also as a Master in Chancery and Referee for the United States District Court in New York and the New York Supreme Court.

He has taught law at his alma mater, at the Georgetown Law Center and at the New York Law School. He is a Colonel in the United States Air Force Judge Advocate General's Department — Retired Reserve. He has been a consultant to the Delegation of the Holy See on the United Nations Conference on Narcotic Drugs, and has served as member and chairman of various committees of the American Bar Association and the New York State Bar Association.

Judge Re has also served as President of the American Foreign Law Association, President of the Federal Bar Council and President

of the American Justinian Society of Jurists. He is also a member of the Advisory Committee on Appellate Rules of the Judicial Conference of the United States.

As a result of Ed Re's outstanding service, he has earned many awards for his educational, legal and civic contributions to our whole country, not just to this Court.

Even more important than his outstanding record, which I have touched on but lightly, Judge Re and his wife, Peggy, have established a fine family which includes twelve children.

The United States Customs Court is an extremely important body. Although very little is known about it, the Court has a great portion of Americans' public interest at heart. The Customs Court has the responsibility to hear and determine the application for review and reappraisement of merchandise, petitions against decisions of collectors, and petitions for remission of additional duties.

On January 10, 1969, Edward D. Re was appointed to the Customs Court by the late President Lyndon B. Johnson. He has served in that capacity in a most outstanding manner.

It is indeed an honor to be designated as one of the nine persons in the United States to have the responsibility borne by the Customs Court, and it is an even greater honor to be the one person among the nine to be selected as its Chief Judge.

The Chief Judge, in addition to the responsibilities of a Judge hearing such cases, must make decisions for the Court in administering its fiscal affairs, the clerical staff, and other administrative functions.

The United States Customs Court, I know, will be well served by you, Judge Re, as it has been in the past. I can only say that this is one of the finest and most deserving appointments that I have seen in my political career on the national level. To see the American dream come true, especially for one as deserving as Edward D. Re, is also a pleasure. I am certain that we will look upon this moment with fond memories in the years to come, and I congratulate you, my friend, Judge Re.

(Applause)

CHIEF JUDGE MARKEY: Thank you, Senator DeConcini.

HONORABLE EDWARD D. RE

The Court is honored now to hear from the First Citizen of this great city, the distinguished Mayor of the City of New York, The Honorable Abraham D. Beame.

MAYOR BEAME: Mr. Chief Justice, Chief Judge Markey, Chief Judge Re, distinguished members of the Bench and Bar, ladies and gentlemen.

May it please the Court: I am greatly honored to participate in this Investiture of Edward Re as Chief Judge of the United States Customs Court. I am also very pleased because Judge Re is one of my dear friends as is Judge Paul P. Rao of this Court.

Judge Re and I have known each other for many years. I have always enjoyed his friendship and always valued his counsel very highly. What has never ceased to amaze me about Judge Re has been his prodigious productivity in every field.

(Laughter)

He has received more degrees than most of his colleagues. He was admitted to practice in many courts and administrative agencies. His honors and awards take up more than a page of his biography. It must have cost him an arm and a leg in dues payments for all the memberships he holds in various organizations. His many books and articles on the law make up an impressive collection and, when it came to children, he obviously believed in the principle of "cheaper by the dozen."

(Laughter)

As a neighbor in my Belle Harbor days before becoming Mayor, I used to marvel at his adroitness in marshalling his offsprings to do the shopping and chores for which he trained them so well.

The large quantity of Judge Re's work is matched only by its high quality, and his achievements make his family and friends very, very proud.

I rejoice with him and his lovely wife, Peggy, in his new assignment.

A New Yorker; a scholar; a gentleman; a sage; a lawyer; a soldier; a patriot; a Judge; teacher; author; father and friend, Judge Re will bring new luster to the Customs Court as its Chief Judge.

Congratulations, your Honor, and God bless you.

PROCEEDINGS

I would like to put my application in now to get a pass to the Judges' Dining Room.

(Applause)

CHIEF JUDGE MARKEY: Thank you, Mr. Mayor.
It is my privilege now to introduce the Deputy Secretary of the Treasury, The Honorable Robert Carswell.

DEPUTY SECRETARY CARSWELL: Mr. Chief Justice, Chief Judge Markey, Chief Judge Re, distinguished members of the Bench and Bar, ladies and gentlemen.

May it please the Court: I am also honored to be in New York today to participate in the Investiture of Judge Edward Re as Chief Judge of the United States Customs Court, and to represent Secretary Blumenthal and my other colleagues at the Treasury Department.

The Customs Court may not be the best known Court in this country, but it is an important and distinguished one. No one knows that better than the men and women of the Customs Service and the Treasury Department. Since we appear in virtually every case before this Court, we can readily attest to the significance of these cases, and also to the Court's extraordinary workload. Today, there are more than 98,000 cases on the Court's docket. Some involve issues that could well affect, significantly, our nation's patterns of foreign trade, its ability to meet various treaty obligations, and the regular flow of vital imports to our markets.

Only a very able jurist will be able to lead the Court through the orderly resolution of these issues, and our nation is very fortunate in having such a jurist in Judge Re.

I have a very special personal feeling for this Court and its work. One of my father's oldest friends was Webster J. Oliver, who served as a distinguished Chief Judge of this Court for 25 years. I remember him calling the night another great Democratic President appointed him to this Court and I remember, in subsequent years, the dedication and skill with which he approached the work of the Court, and the affection he had for his colleagues here.

I am glad we have in Judge Re a man who will also bring those qualities to the leadership of the Court. Judge Re has had a long and prestigious career as an attorney, professor of law, scholar, Air

HONORABLE EDWARD D. RE

Force officer, hearing officer, Chairman of the Foreign Claims Settlement Commission, Assistant Secretary of State, and jurist.

His opinions, while they do not always match the brevity of his name, demonstrate a mastery of one of the more complex branches of our law. We at the Treasury Department are delighted that his erudition and expertise will be available to the Court in the years ahead.

We congratulate him on his appointment and wish him and his splendid family continued success.

(Applause)

CHIEF JUDGE MARKEY: Thank you, Mr. Secretary.

It is my privilege to introduce another great lawyer from Georgia, the distinguished President-elect of the American Bar Association, Mr. William B. Spann.

MR. SPANN: Mr. Chief Justice, Chief Judge Markey, Chief Judge Re, distinguished members of the Bench and Bar, ladies and gentlemen.

May it please the Court: When President Justin Stanley asked me to represent the American Bar Association on this important occasion, I accepted with great pleasure for two reasons. First, because the American Bar Association and the organized Bar owe a debt of gratitude to Chief Judge Edward D. Re because his professional life has included a substantial commitment of service to the law and to the Association.

Judge Re has been particularly active and effective in the realm of international law. He has been a leader in the American Bar Association Section of International Law for over 20 years. His service includes membership on, and chairmanship of, many section committees, membership on the council of the Section of International Law and, from 1965 to 1967 Chairman of the Section.

In 1976, the International Law Section called upon Judge Re to be its spokesman in the House of Delegates. As section delegate, he not only brings effective and influential counsel to the House on matters of trade, customs and international law, but also on a myriad of other issues which that body deliberates and passes upon.

But, more importantly, I am delighted to be the bearer of best wishes today because I have been fortunate enough to know Judge

Re for many years. Over the years, I have been active on the International Law Section both as a past member of the Section, serving on committees of that Section, and currently as its liaison representative on the Board of Governors. This has given me the opportunity of working with Judge Re and knowing him better, and, indeed very recently we had the occasion to do so.

His work and his person symbolize intelligence, fairness, dedication, integrity and discernment. I know he has brought these same attributes to this Court for the past several years and will continue to do so.

On behalf of the American Bar Association, I extend my heartiest congratulations to you on your Investiture as Chief Judge. Thank you.

(Applause)

CHIEF JUDGE MARKEY: Thank you, Mr. Spann.

The Court now is pleased to recognize a distinguished visitor to our country, The Honorable Franco Foschi, the Under Secretary of State, Ministry of Foreign Affairs of the Republic of Italy.

(The Honorable Franco Foschi, Under Secretary of State, Ministry of Foreign Affairs, The Republic of Italy, spoke briefly in Italian and conveyed a message of good will from the President of Italy, The Honorable Giovanni Leone, and from the Prime Minister of Italy, The Honorable Giulio Andreotti.)

CHIEF JUDGE MARKEY: Thank you, Mr. Secretary. And now we will have a translation.

CHIEF JUDGE RE: I should like to welcome the distinguished Consul General of Italy, His Excellency Alessandro Cortese DeBosis, who will give a translation. Mr. Consul General, it is a great privilege to have you here.

CONSUL GENERAL CORTESE DE BOSIS: "Mr. Chief Justice, Chief Judge Markey, Chief Judge Re, and distinguished members of the Bench and Bar, ladies and gentlemen. The President of the Republic of Italy, The Honorable Giovanni Leone, wishes to express, through me, to Chief Judge Edward D. Re, his most profound and heartfelt congratulations for this well-deserved appointment as further recognition of the high services which he has so remarkably rendered to his country and to the administration of justice since the early day of his career in 1947.

HONORABLE EDWARD D. RE

"On his behalf, the President of the Council of Ministers, Prime Minister Giulio Andreotti, wishes to extend to Chief Judge Edward D. Re his heartfelt congratulations for the honor which has been bestowed upon him in recognition of his noteworthy services, and to extend to him also his most sincere best wishes for the important duties to which he has been newly appointed.

"I wish to add, in the name of the Italian Government, and also on my own personal behalf, my warmest greetings, and I wish to thank you for the kind welcome which you have extended to me. To be able to attend this ceremony during which Judge Re is formally vested with the duties of Chief Judge of the United States Customs Court deeply moves me.

"This particular feeling is brought on by the realization that an American of Italian heritage has ascended to one of the most important and prestigious offices in the judiciary of the United States.

"My visit to the United States has also allowed me to realize how the will to succeed, combined with spiritual values, through sacrifice and diligence, permitted the Italo-Americans to find for themselves positions on the highest level of American society.

"Furthermore, the Italian-American community has played a very significant role in the spectacular economic and social progress of the country which has offered them its hospitality.

"The Italo-American community has been capable of actively participating in the American evolutionary process, bringing to it unique Italian cultural values which it has never renounced, and which it has wished to maintain as characteristic of its own heritage.

"Italian-Americans are represented today at all levels and in all fields of the American endeavor: in the Senate, and Federal and local administration, in the judiciary, in the business world, in the arts and in all the professions. This success, this affirmation of Americans of Italian origin, is also the affirmation of Italy and of the modern cultural values with which it is tied to the United States. The values are today once more reconfirmed and recognized with the Investiture of Chief Judge Edward D. Re to one of the highest judicial positions ever held by an Italian-American."

I may also add, on behalf of the Ambassador of Italy, and in my own behalf, my very sincerest congratulations to my noble and learned friend, Chief Judge Edward Re.

(Applause)

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CHIEF JUDGE MARKEY: Thank you, Mr. Secretary. Thank you, Your Excellency.

The Court will now recognize a distinguished representative of the organized Bar, a past President of the Association of the Bar of the City of New York, and of the American Bar Association, Mr. Whitney North Seymour.

MR. SEYMOUR: Mr. Chief Justice, Chief Judge Markey, Chief Judge Re, your Honors, ladies and gentlemen:

May it please the Court: It is very hard to add anything to the honed truths that have been said about the new Chief Judge. He has been a great friend and worker in the organized Bar. We all know and honor him. He has been a fine teacher of young lawyers. He wrote a fine book on oral argument and brief writing – which would have done a lot of people a lot of good if they read it.

(Laughter)

I think all that I would add is a slightly lighter note. At the Bar Association of the City of New York, for many years, we have had a marvelous band, which included Judge Leonard Moore of the Second Circuit. Chief Judge Re was the jazz drummer. He has assured me that, with all the heavy duties he is now undertaking, he is not going to give up his interest in music. And I would really tender, subject to the correction of The Chief Justice, that Chief Judge Re is the best jazz drumming Chief Judge in the United States.

(Applause)

CHIEF JUDGE MARKEY: Thank you, Mr. Seymour.

The Court will now hear from the President of the Association of the Customs Bar, Mr. Ellsworth Qualey.

MR. QUALEY: Mr. Chief Justice, Chief Judge Markey, Chief Judge Re, and distinguished members of the Bench and Bar, ladies and gentlemen.

May it please the Court: It is a great personal privilege and pleasure for me, Judge Re, to bring you greetings on behalf of our Association on this occasion of your Investiture as Chief Judge of this Court.

The Customs Court has had a long and distinguished history in the field of Customs jurisprudence, and its decisions are increasing in importance in the field of world trade.

HONORABLE EDWARD D. RE

We members of the Customs Bar Association are familiar with Judge Re's many-faceted career, but we know him best as a writer of scholarly and erudite opinions in the field of Customs jurisprudence. Many of his decisions have already become landmarks in that area. I wish to express the pleasure of the Association at his elevation to the position of Chief Judge of this distinguished Court, and I offer sincere congratulations and best wishes for a long and successful term.

(Applause)

CHIEF JUDGE MARKEY: Thank you, Mr. Qualey.

Unfortunately, ladies and gentlemen, there are so many from so far and so near, that it is not possible to introduce all the distinguished guests in the audience. There are so many of you, I am sure, who would like to get to the microphone, and it would be most welcome if we had the time, and who would be most deserving if we had the time.

I do think it appropriate, however, to acknowledge the presence of some of you here with us and, again, each of those acknowledged deserves a long and extended applause; but we would be here all day. So I must ask each one introduced to simply stand and let the people see you, and I will move right on through and, at the end, if you wish, you may recognize their presence as a body. We can not control that, so, if you wish to express special attention, that is up to you.

(Laughter)

First, the Italian Ambassador, His Excellency Roberto Gaja.

(Applause)

You have met the Consul General of Italy, His Excellency Alessandro Cortese DeBosis.

(Applause)

A former Attorney General of the United States, The Honorable Herbert Brownell.

(Applause)

Police Commissioner of the City of New York, The Honorable Michael Codd.

(Applause)

PROCEEDINGS

The Assistant Attorney General of the United States, in charge of the Civil Division, The Honorable Barbara Babcock.

(Applause)

Director of the Administrative Office of the United States Courts, General Rowland F. Kirks.

(Applause)

Director-Designate of the Federal Judicial Center, Professor Leo Levin.

(Applause)

Chief Judge of the United States District Court for the Southern District of New York, The Honorable David Edelstein.

(Applause)

And many of his colleagues of that Bench, as well as the United States District Court for the Eastern District, whose Chief Judge is being represented by Judge Thomas C. Platt.

(Applause)

The Honorable Ruggero Aldisert, Judge of the United States Court of Appeals for the Third Circuit and member of the Board of the Federal Judicial Center.

(Applause)

Judges of the United States Court of Appeals for the Second Circuit, The Honorable Wilfred Feinberg and The Honorable William Mulligan.

(Applause)

The Surrogate of Kings County, The Honorable Bernard Bloom.

(Applause)

The Surrogate of Queens County, The Honorable Louis D. Laurino.

(Applause)

The Surrogate of New York County, The Honorable Millard Midonick.

(Applause)

HONORABLE EDWARD D. RE

The President of the Association of the Bar of the City of New York, Mr. Adrian de Wind.

(Applause)

The President of the New York County Lawyers Association, Mr. Lawrence Cusak.

(Applause)

The Chairman of the Board of Trustees of New York Law School, Mr. John Thornton.

(Applause)

The Vice Chairman of the Board of Trustees of St. John's University, Col. Saul Fromkes.

(Applause)

Vice Presidents of St. John's University, the Reverend Joseph Dirvin and the Reverend John Newman.

(Applause)

Dean of the Columbia Law School, Michael Sovern.

(Applause)

Dean of St. John's School of Law, John Murphy.

(Applause)

Dean of New York Law School, E. Donald Shapiro.

(Applause)

Congressman of New York, The Honorable Joseph Addabbo.

(Applause)

Another Congressman of New York, The Honorable Mario Biaggi.

(Applause)

Another Congressman of New York, The Honorable Bruce Caputo.

(Applause)

Of course, ladies and gentlemen, I can not single out but I do wish to acknowledge the presence of many, many distinguished members of the Federal and State Judiciary seated immediately before the

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Bench, as well as many distinguished members of the Bar.

The Investiture Committee received many communications from members of the Congress pertaining to today's ceremony. Among these are communications from The Honorable James O. Eastland, Senator, Chairman of the Senate Judiciary Committee, and also from Senators Hubert H. Humphrey, John H. Chafee, Edward M. Kennedy, Daniel P. Moynihan, Pete V. Domenici, and John O. Pastore, as well as from many members of the House of Representatives and from its Speaker, The Honorable Thomas P. O'Neill.

All of those are too numerous to read, but the Committee has selected a few communications as representative of all. They read as follows:

"Please accept my warm personal congratulations on your Investiture as Chief Judge of the United States Customs Court. Over the years, you have served our nation with great distinction in numerous capacities, and it is fitting yours should be the first judicial appointment of the Carter administration.

"I remember well the confidence my brother, President Kennedy, had in you when he appointed you Chairman of the Foreign Claims Settlement Commission in 1961, and I want to assure you that I share that confidence.

"You have my very best wishes as you assume your important and challenging new responsibilities."

Signed, "Ted Kennedy, United States Senator."

And:

"Very best wishes on your Investiture. I am so sorry that NATO business has called me abroad and forced me to miss your ceremony, but know that you have my every confidence, and my very best wishes for success.

"Sincerely, Jacob K. Javits, United States Senator."

Next:

"You have served well on the Bench and are now most deserving to be Chief Judge of the Customs Court. Your family and friends have reason to be proud and I wish I could be with them to honor you today.

"With every good wish,

"Sincerely, Thomas P. O'Neill, Jr., Speaker of the House."

HONORABLE EDWARD D. RE

I have the privilege of reading the following communication:

"Please accept my congratulations as you assume the distinctive honor of Chief Judge of the United States Customs Court. Although my schedule makes it impossible for me to attend, you have my warmest wishes for continued success and happiness in this new and challenging appointment."

Signed, "Secretary of Health, Education and Welfare, Joseph A. Califano, Jr."

In addition, I have the privilege to read into the record the following short communication:

"I just want to extend to you my very best wishes upon your appointment as Chief Judge of the United States Customs Court.

"The people of the United States have been very fortunate to have you serving on the Customs Court since 1969. Your scholastic record, your many published works, your noteworthy years of service to Presidents Kennedy and Johnson, and your tenure as an exceptionally competent Judge, certainly well qualify you for this newest honor.

"Joan and I want you and Peggy to know that our thoughts will be with you as Chief Justice Burger swears you in.

"With warmest regards,

"Sincerely, Walter F. Mondale, Vice President of the United States."

And from a former Vice President of the United States, the following to Chief Judge Re:

"I deeply regret that I can not accept the kind invitation of my friend Judge Edward D. Re to be in New York for his Investiture ceremony on May 27th. I do want to send my greetings to all in attendance, however, and to join Ed Re's many friends and admirers in extending congratulations to him on this significant occasion.

"Best wishes."

Signed, "Hubert H. Humphrey, Senator."

Before calling upon The Chief Justice to administer the Constitutional Oath to Chief Judge Re, may I say that – with all due deference to the President of the United States – today's ceremony would not be taking place were it not for the cooperation of a lovely lady whose presence adorns this occasion as no one else's could; the proud and gracious mother of Chief Judge Re, Mrs. Marina Maetta Re.

(Applause)

Sharing equally in that pride, as a true and loving partner in the everyday life of the new Chief Judge – and everyone here knows what a busy day that must be – the lawyer and former law school pupil of Chief Judge Re; his lovely and beloved wife, Peggy Re.

(Applause)

I am happy also to acknowledge the presence of Mrs. Nancy Scanlon, the sister of Chief Judge Re; and, representing the spiritual side of the family, an uncle, the Reverend John Maetta.

(Applause)

There is another large group of guests present today, who helped to expand the already large number in attendance at this ceremony –and in keeping with my apologies for not being able to mention all of our guests, I am not going to mention them individually – because there are only "twelve." Of course, I refer to the children of Judge and Mrs. Re– whom I would ask, collectively, to rise to the occasion.

(Children rising.)

(Applause)

And, finally, there are two guests with us today who have come to pay tribute to their former pupil. Special mention ought to be made because were it not for their contribution we might not be observing this Investiture ceremony today. These two dedicated teachers helped Judge Re learn English at Public School 176 in Brooklyn upon his arrival in the United States at the tender age of eight. I am pleased to acknowledge Mr. John Torzilli and Mr. John Gonoud.

(Applause)

Ladies and gentlemen, The Chief Justice of the United States.

(Applause)

CHIEF JUSTICE BURGER: Chief Judge Markey, Judge Re – I am not going to address you as "Chief Judge Re" yet because there has been a certain prematurity about some of the comments here today.

(Laughter)

You are engaged but you are not yet married; and, therefore, until we complete this little ceremony, you are "Judge Re."

(Laughter)

I am very happy to take part in this program, having been a member of the Bar of this Court, and practiced before it earlier in this century. And I am very happy to be able to meet some of my judicial colleagues of this Court and to partake in this program.

I think it only fitting, since Judge Re has not been confirmed by the Senate – because the statute does not require confirmation but only the appointment by the President of the United States – that we take a vote here and see if he is confirmed.

(Laughter)

I am going to ask that we do so by a show of hands.

All in favor of confirming Judge Re as Chief Judge of this Court – subject to his qualifying and taking the oath – raise your right hands.

(Raising of hands.)

There are "no" contrary-minded. They will not be permitted today.

(Laughter)

On the way in here to the ceremony, Ed Re and I were stopped briefly by, I think, a representative of Walter Cronkite; and at the risk of scooping Walter Cronkite's 6:00 or 7:00 o'clock broadcast – whichever it may be – I want to be serious for a moment and tell you what question he asked. He asked me: "How would you characterize Judge Re in this appointment, in a few words?" And I said I could do it in three words: intelligence, industry and integrity.

And I will now ask you all to rise, including the members of the Court, and we will administer the oath of office.

(All rising.)

Judge Re, if you will hold the Bible in your left hand and raise your right hand and repeat after me:

(Whereupon, The Chief Justice of the United States administered the following oath of office to Chief Judge Edward D. Re)

"I, Edward D. Re, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as Chief Judge, United States

Customs Court, according to the best of my abilities and understanding, agreeable to the Constitution and laws of the United States; and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

CHIEF JUSTICE BURGER: Congratulations!

Now, ladies and gentlemen, and distinguished guests, if I may, I accurately present to you the Chief Judge of the United States Customs Court.

(Applause)

CHIEF JUDGE RE: Mr. Chief Justice, Chief Judge Markey, my dear colleagues, eminent Judges, General Bell, Senator DeConcini, Chairman Rodino, Secretary Foschi, Secretary Carswell, Mayor Beame, distinguished members of the Congress, distinguished public officials and friends:

This is a moment for a simple but genuine statement of gratitude and appreciation for the esteem, confidence and friendship that have been expressed and demonstrated by all of you; by the kind words of the distinguished speakers, and also by the presence of everyone here.

Your presence has given added meaning to this important day of my life and that of my family. I shall say nothing that will be in the nature of refutation of all of the wonderful things that have been said. We are all assured by the fact that men of the highest integrity and great honor have spoken – so their word is not in issue.

I regret that there has been an overcrowding. I misjudged the effect of having the Investiture precede Memorial Day, or "Decoration Day," as it is known in certain places. I took for granted that so many would have been leaving the City for the Holiday, and therefore would not have been able to attend this ceremony.

One of the peripheral advantages of the designation by the President was that I heard from so many friends. Answering the large quantity of letters, telegrams and telephone calls will keep me busy – in addition to the judicial duties that I will continue to perform – for several weeks.

HONORABLE EDWARD D. RE

(Laughter)

A special debt of gratitude must be expressed to The Chief Justice of the United States. I have informed him that I had absolutely no illusions about the nature of the response to the gracious invitation that all of you received. The fact that his name was on the invitation, I am sure, had nothing whatever to do with the rather overwhelming affirmative responses.

(Laughter)

The Attorney General, of course, has played a very special part, and I am deeply indebted to him for his presence and gracious remarks.

Chief Judge Markey is, by far, the best toastmaster that the Investiture Committee could possibly have chosen. Were he not to grace the Court of Customs and Patent Appeals, the Court to which appeals are taken from this Court, and were he to so choose, I can assure you that he could earn a magnificent livelihood simply by performing as an outstanding toastmaster.

(Laughter)

Those of us who are privileged to attend the annual Judicial Conference of the Court of Customs and Patent Appeals know that there is no end to Chief Judge Markey's wisdom and display of humor. His jokes are splendid. As a matter of fact, Mayor Beame, I have heard jokes in this great city of ours that I know found their origin at that Judicial Conference; and they originally came from the lips of none other than Chief Judge Markey.

What can I say about my dear friend, Congressman Rodino. It is no secret to say that it was he who, in 1960, first conveyed the happy news that I was about to be appointed Chairman of the Foreign Claims Settlement Commission of the United States by President Kennedy.

Congressman Rodino is a wise man for he obviously knows that you can not be a statesman in Washington unless you are elected at home. Back in 1960, I recall that he wisely called a relative of mine, the pastor of his church, to inform him of my appointment. He called Father Ruggiero, who, late one night, telephoned me and said, "I know you are going to be appointed by President Kennedy tomorrow morning because I was just told by Congressman Rodino; and when Pete Rodino says something, it is accurate, and you may rely on it."

(Laughter)

What Father Ruggiero said that evening in 1960, I have always found to be true in all of my many dealings – governmental, social, cultural and educational – with Congressman Rodino.

Congressman Rodino, you make all of us very proud. It is a special pleasure and privilege to have you here at this Investiture. All of us wish you and your wonderful family every happiness. We are so pleased that your family is also here.

With Senator DeConcini, it was a matter of "love-at-first-sight." I am grateful to him for his kind and gracious remarks, and look forward to seeing much more of him. His star is surely on the rise, and all of us will some day be extremely happy to say: "Yes, we remember him well. He spoke at the Investiture of the Chief Judge with the very short name." Of course, I was saddened to hear that my opinions do not have the same reputation for brevity.

(Laughter)

Many thanks to all of the other wonderful speakers – all dear friends, valued, good and kind colleagues, who have added so much to the significance of this Investiture.

This is for me an event of importance, and, I firmly hope, one that will augur well for the United States Customs Court on which I have been privileged to serve since my appointment by President Johnson.

I must express my genuine thanks to my colleagues on the Court, and to the Investiture Committee in particular.

The Investiture Committee, as you will note from your program – prepared by the Committee – consisted of Judge Morgan Ford, Judge Frederick Landis, and Judge Bernard Newman.

Judge Landis, who previously served as the Chief Justice of the highest court of Indiana, after I appointed this Committee, with the approval of my distinguished predecessor, the former Governor of South Dakota, Judge Nils A. Boe, said: "Ed, I would like to bring to your attention that you appointed a wholly Republican Committee."

I simply wanted to prove the irrelevance of prior political affiliation once ascending to the Federal Bench. Of course, I assured him that it was a mere coincidence.

(Laughter)

Surely, a word of appreciation must be expressed to the President of the United States for his confidence in having designated me.

Permit me to conclude simply by saying that in every word and deed I shall strive to prove worthy of the trust and confidence that have been reposed in me.

Thank you so much.

(Applause)

CHIEF JUDGE MARKEY: Chief Judge Re – my brother: Little can be added to the marvelous words of the distinguished men of law and statesmanship who have spoken here today and have graced this courtroom.

One of the honors and privileges of my position is to occasionally speak for my brothers and to my brothers – so this is just a private visit – no more than one minute – in which our guests, including The Chief Justice, may eavesdrop.

Eddie, you fought for the law, you have taught the law, you have executed the law, you have interpreted and applied the law; and, now, as a new captain, you will administer the law in an institution of the law. There will be occasional headaches and joys. There will be occasion when someone may seem to have forgotten Kipling's words that "the ship is greater than the crew." When that happens, your 34 years of devotion to the law, to mercy and justice, will see you through. For long ago, on another Mount, those who suffered, sought and sacrificed for justice were called "Blessed."

Your brothers wish you Godspeed.

(Applause)

CHIEF JUDGE MARKEY: Now, ladies and gentlemen, we have some announcements. New York Law School has asked me to invite you all to attend a reception which will begin in 15 minutes in the Judges' Dining Room and Exhibit Area located on the 5th floor of the adjacent Federal Building.

Court attendants will be available to show you the way to the reception.

The Chief Justice, The Attorney General, and our other distinguished guests, have agreed to receive all of you – the friends of Chief Judge Re – as you enter the Dining Room.

So that we may all have an opportunity to prepare for the receiving line, and to be in a position to meet you there, please remain in the

courthouse for about 15 minutes before proceeding to the Dining Room.

This Investiture is now concluded.

The Marshal will adjourn the Court.

THE MARSHAL: Rise, please.

This Honorable Court now stands adjourned, *sine die*.

MEMORIAL RESOLUTION

PASSED BY THE UNITED STATES CUSTOMS COURT
UPON THE DEATH OF

THE HONORABLE MARY DONLON ALGER,

JUDGE

The Court records with deep regret the untimely death of Mary Donlon Alger, Senior Judge, our esteemed friend and distinguished jurist on March 5, 1977, in Tucson, Arizona.

The life and works of Mary Donlon Alger were an outstanding model of the highest traditions of our judicial system. Her extensive knowledge, experience and ability as a Judge in the complex practice and procedure involving the customs law serve as an enduring example.

Mary Honor Donlon Alger, the daughter of Joseph M. and Mary Coughlin Donlon was born in Utica on August 25, 1893. She was graduated from Utica Free Academy and the Law School of Cornell University in Ithaca, New York in 1920. Her Law School honors included election to the Board of the Cornell Law Quarterly and, in her senior year, as its Editor-in-Chief; also, election to a Fraser Senior Scholarship, awarded by vote of the Cornell Law School seniors to only two of their classmates chosen from among those nominated by the Faculty on the basis of academic attainment and professional aptitude.

Mary Donlon Alger practiced law in New York City for 23 years from the time of her admission to the New York Bar in 1921. She began her practice of law in the office of Daniel Burke, Esq. In 1928 she became a partner in the law firm of Burke & Burke, remaining until Governor Thomas E. Dewey appointed her Chairman of the New York State Industrial Board in 1944.

On April 1, 1945, Governor Dewey appointed her Chairman of the newly-organized Workmen's Compensation Board of the State of New York, a position she held for nearly ten years until her resignation on December 31, 1954.

Mary Donlon Alger was appointed Judge of the United States Customs Court by President Dwight D. Eisenhower on June 22, 1955, the first woman in New York State named to the Federal

Bench. Her appointment was confirmed by the United States Senate on July 29, 1955. On August 10, 1955, the oath-taking ceremony was held in the office of the Attorney General, Herbert Brownell, Jr., in Washington, D.C.

A loyal daughter of Cornell University, she was a trustee of the University from 1937 to 1966, when she became trustee emeritus. In 1961 Cornell University named in her honor a new dormitory, known as Mary H. Donlon Hall. In 1974 she established the Mary Donlon Professorship, to be filled by a woman.

In 1964 she served as a member of the faculty of the Salzburg (Austria) Seminar on American Law. She received honorary doctorates from Skidmore College, Nazareth College and Marquette University.

Our late colleague was honored by appointment to serve in numerous civic leadership positions. She was Chairman of the Conference on Women in the Defense Decade of the American Council on Education, held in New York City in 1951. During World War II she organized, as Chairman, an Information Center for servicemen and women in New York City.

A Republican, active in politics prior to her judicial appointment, she was for fifteen years a member of the Republican State Executive Committee of New York. In 1944, as delegate to the Republican National Convention in Chicago, she served as a member of the Resolutions Committee and as Vice-Chairman of that Committee in association with the late Senator Taft, who was Chairman. In 1948, as delegate to the Republican National Convention in Philadelphia she served, under former Senator and later Ambassador Henry Cabot Lodge, who was Chairman of the Resolutions Committee, as Chairman of the Subcommittee that conducted hearings and proposed platform planks in the fields of education, housing, welfare and labor. In 1954, as delegate to the New York State Republican Convention, she served as Chairman of the Convention's Resolutions Committee and presented the platform to the Convention, the first woman to hold this important Convention chairmanship.

When membership in the Association of the Bar of the City of New York was first opened to women, Mary Donlon Alger was one of the group of twelve women lawyers initially admitted to membership in the Association. She was a member of the American Bar Association, the New York County Lawyers Association, the National Association of Women Lawyers, the International Association of Industrial Accidents Board and other professional organizations, as well as having served as president of the Turtle Bay Chapter of the Catholic Interracial Council.

As a Judge of the United States Customs Court, Mary Donlon Alger was admired by her associates. Her middle name, Honor,

truly personified that attribute so closely associated with her. Her wit and charm endeared her to her associates and friends alike.

In the course of her service as a member of the Court, she unstintingly devoted herself to the administrative, as well as the judicial, work of the Court.

Therefore, be it resolved, that the Chief Judge and the Judges of the United States Customs Court do hereby record their high appreciation of the life and character of Mary Donlon Alger, of the respect, admiration and esteem in which she was held and of the loss the Court, the Bar, and customs jurisprudence have suffered by her death and do hereby express their deep sympathy to her devoted and loyal husband, Martin, her sisters, Mrs. James C. Huntington and Mrs. Edward J. Alexander, and all her family, upon her passing.

This is to certify that the above resolution was duly adopted at a meeting of the Judges of the United States Customs Court held on Monday, March 28, 1977.

/s/ Joseph E. Lombardi
Clerk of Court

Customs

(C.D. 4685)

MOBAY CHEMICAL CORP. *v.* UNITED STATES

Urethane pastes

SUMMARY JUDGMENT—ABSENCE OF ISSUE OF MATERIAL FACT

In the case on which plaintiff's motion for summary judgment is based these pastes were held to be plastics materials because they could form plastic articles by themselves. Since this capability remains undisputed defendant does not raise an issue of material fact when it asserts they are invariably used to supply color to plastic articles. They are more than colors and remain most accurately described by the provision for plastics materials. *Verona Dyestuffs Div. of Verona-Pharma Chemical Corp.* v. United States 69 Cust. Ct. 26, C.D. 4369 (1972) discussed and clarified.

JURISDICTION—ACTION NOT COMMENCED BY PROPER PARTY

Three of the actions consolidated herein were commenced after the corporation whose protests had been denied had ceased to exist by virtue of its merger with other corporations and the creation of a new corporation now known as *Mobay Chemical Corp.* Those actions were not commenced by the party allowed to do so and the court therefore lacks jurisdiction over them.

Court Nos. 70/36742, etc.

Port of New York

[Plaintiff's motion for summary judgment granted.]

(Dated January 25, 1977)

Sharretts, Paley, Carter & Blauvelt (*Patrick D. Gill* of counsel) for the plaintiff.
Irving Jaffe, Acting Assistant Attorney General (*Herbert P. Larsen*, trial attorney), for the defendant.

Opinion and Order

Watson, Judge: Defendant has striven mightily to show the existence of issues of material fact which would make these cases inappropriate for the summary disposition plaintiff seeks. Plaintiff relies on the decision in *Verona Dyestuffs Div. of Verona-Pharma Chemical Corp.* v. *United States*, 69 Cust. Ct. 26, C.D. 4369 (1972), in which this court held urethane pastes such as these to be classifiable as "plastics materials" [1] rather than "mixtures" [2] because they possessed sufficient polymer content to form plastic articles by themselves. The articles in dispute here differ only with respect to the colors of their pigments but are otherwise the same mixture of approximately 16% pigment, 75% polyester resin and 9% plasticizer as were the subject of the *Verona* decision.

Defendant now asserts the correctness of classifying these pastes as color toners [3] rather than plastics materials. Consistent with its new position and in an attempt to demonstrate the existence of issues of material fact, defendant has amassed a series of affidavits attesting to the fact that urethane pastes are invariably used to impart color to plastic articles and the purpose of their polymer content is to render the pigment they contain "compatible" with the plastics materials or "facilitate its introduction" into the plastics materials.

All this concentration on the coloring function of the importations and on the polymer content as the vehicle for transmitting the color does not raise issues which are material to the outcome of the case. The points which defendant now stresses are consistent with the fundamental reasoning of the *Verona* case and leave the material and determining facts of the case undisturbed. The conclusion reached in the *Verona* case was not based on the actual use of the pastes and its reading of the scope of plastics materials is not altered when considered against the newly argued provision for "colors."

The essential material fact which determined the *Verona* decision was the undenied capability of the imported pastes to form plastic articles by themselves. In that respect they fell within the plain meaning of plastics materials without regard to whether their pigment content was high or low and without regard to whether it was the color or the polymer content which was of the primary importance in their actual use.

Defendant does not place in issue the fact these pastes can form plastic articles by themselves. It follows then that even if they are in practice exclusively used to supply color they are in substance more

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[1] Item 405.25 of the Tariff Schedules of the United States.
[2] Item 409.00 of the TSUS.
[3] Item 406.70 of the TSUS.

than mere colors. The distinction between articles which can be classified as colors and those which are plastic materials, despite their putatively high concentration of pigment, is simply the ability of the latter to form plastic articles by themselves. It was this distinction the court sought to draw when it disclaimed any intent to include in the term plastics materials "a product whose primary purpose and basic nature is that of a coloring agent without a significant or meaningful admixture of plastic raw materials." By this language the court did not intend to foster a distinction based on actual use but rather to indicate that its holding did not emasculate the "color" provision because that provision would continue to govern colors in "pure" form and in other forms which lacked sufficient polymer content to make plastic articles by themselves.

It may be that by going so far into discussion of the use of the imported pastes as to discern a dual function when used (the introduction of color as well as polymeric content) and by engaging in rather loose theoretical discussion of the "fundamental" or "basic" nature of the products, the *Verona* decision left room for the impression that actual use was a determining factor or perhaps that a finding as to the quintessential or absolute character of the importation had been made. If such an impression was created it was probably a result of excessive and unnecessary elaboration of the basic theme of the decision. The essence of the decision and the area on which attention should have been exclusively focused was the capability for use of these pastes. So long as they were capable of forming plastic articles by themselves classification as plastics materials was correct. This capability remains undisputed and in the present context makes the provision for colors inappropriately narrow. The provision for plastics materials (with its inclusive headnote [4] which permits the presence of colors in plastics materials) remains the proper classification for these pastes.

In its statement of material facts defendant reiterates the contentions raised in its cross-motion of December 1, 1975 that jurisdiction is lacking in three of the cases consolidated herein, Court Nos. 72–6–01283, 73–3–00745 and 73–7–01790. The cross-motion referred to was made in partial opposition to plaintiff's motion to substitute *Mobay Chemical Corporation* in the cases contained in this consolidated action which were earlier captioned with various forms of the names of the *Verona Corp. Mobay* was the successor in interest to the *Verona* assests and choses in action by virtue of *Verona's* merger with other corporations and the formation of a new corporation which was

[4] Headnote 3 to subpart C of schedule 4 of the TSUS reads in relevant part as follows:

3. The term "*plastics materials*" in item 405.25 embraces products formed by the condensation, polymerization of organic chemicals and to which plasticizers, fillers, colors, or extenders may have been added. . . .

ultimately named *Mobay*. Plaintiff's motion to substitute *Mobay* was granted without distinguishing the three cases in which severance and dismissal was sought by defendant.

Upon further reflection it now appears that defendant's objection was well-taken. The three actions were started in court at a time subsequent to the cessation of *Verona's* corporate existence. The successor corporation now named *Mobay*, not being the party whose protest was denied and having no relation to the underlying customs transaction, could not commence those actions in this court. See, 28 U.S.C. § 1582 (a), (c). See also, 19 U.S.C. § 1514(b). The circumstances seem therefore to be analogous to those in *Parksmith Corp. et al.* v. *United States*, 77 Cust. Ct.102, C.D. 4678 (1976). Since these three actions were not brought to court by the party allowed to do so under the law, the court lacks jurisdiction of them and they must be dismissed.

It is therefore,

ORDERED, that Court Nos. 76–6–01283, 73–3–00745 and 73–7–01790 be dismissed, and it is further

ORDERED, that the urethane pastes embraced by the above-captioned consolidated action are properly classifiable as plastics materials under item 405.25, TSUS, as modified by T.D. 68–9, at the rates of 2.8 cents per pound plus 18 percent ad valorem (pre-1968); 2.5 cents per pound plus 16 percent ad valorem (1968); 2.2 cents per pound plus 14 percent ad valorem (1969); 1.9 cents per pound plus 12.5 percent ad valorem (1970); 1.6 cents per pound plus 10.5 percent ad valorem (1971); 1.4 cents per pound plus 9 percent ad valorem (post-1971), depending upon the date of entry; and it is further

ORDERED, that the entries shall be reliquidated accordingly.

(C.D. 4686)

MITSUBISHI INTERNATIONAL CORP. *v.* UNITED STATES

Pipe and pipe fittings

Various articles, consisting of bent pipe, articulation joints, reducers, sliding and fixed base plates and test pieces, were imported from Japan for installation in a penstock system, i.e., a conduit for conducting water used in a power project. They were appraised at single unit values, net, packed, on the basis of constructed value as defined in section 402(d) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956. Plaintiff did not dispute the basis of appraisement, but alleged that the appraisements were separable, and challenged only the additions allegedly made to the invoice unit values for profit and "assists," the latter consisting of

bid drawings, specifications and blueprints. HELD: the appraisements were not separable. From the official papers it is apparent that the appraised values were not, as plaintiff claimed, determined by making additions to the invoiced unit values. Since the various items either were not separately invoiced or entered, or their appraised values not separately listed, the amounts by which they were advanced in appraisement cannot be ascertained on the record. It is a basic prerequisite for the application of the separability doctrine that the disputed charges be ascertainable. Moreover, testimony established that the import specialist determined the initial appraisement of each article by making separate findings with respect to the cost elements provided for in the statutory constructed value formula.

Plaintiff claimed that the bent pipe, classified under item 610.80 as pipe fittings of iron or steel, and the reducers and articulation joints, classified under item 657.20, a basket provision for articles of iron or steel, should properly have been classified under item 610.32 as pipes of iron or steel. HELD: as to the articulation joints, plaintiff's claim is sustained; as to the bent pipe and reducers, plaintiff's claims are dismissed, but without affirming the classification of the reducers.

CLASSIFICATION—DETERMINED BY CONDITION AS IMPORTED

The classification of imported merchandise is determined by its condition as imported. *Hurricane Import Co. et al.* v. *United States*, 58 Cust. Ct. 541, C.D. 3046 (1967). The common meaning of a term controls the construction and interpretation of tariff statutes. *Nomura (America) Corp.* v. *United States*, 62 Cust. Ct. 524, C.D. 3820, 299 F. Supp. 535 (1969), *aff'd*, 58 CCPA 82, C.A.D. 1007, 435 F. 2d 1319 (1971).

The so-called articulation joints were imported as straight pipe and, after importation, were connected by means of articulation couplings to adjacent pieces of pipe. They come within the common meaning of pipe as provided for in item 610.32 and hence, by application of the rule of relative specificity, are properly classifiable as claimed by plaintiff under that item.

The primary function of the reducers, which are used in the system to connect pipes of different diameters, is to reduce the water pressure on the downstream portion of the penstock. They are more than mere pipes and, as shown by various lexicographic sources, prior judicial decisions and legislative history, come within the common understanding of pipe fittings. Since plaintiff failed to sustain its burden that they are classifiable as pipes, its claim is dismissed without affirming the classification.

Plaintiff failed to establish that the bent pipe, one-piece articles with various angles of bend, come within the common meaning of pipe. The articles, which are used to alter the direction of flow, are more than mere pipe, and are comparable to elbows. Their classification was therefore affirmed.

Court No. 73-9-02678

Port of Los Angeles

[Judgment in part for plaintiff and in part for defendant; remanded in part.]

(Decided January 26, 1977)

Glad, Tuttle & White (*Edward N. Glad* of counsel); *Jun Mori*, associate counsel; for the plaintiff.

Irving Jaffe, Acting Assistant Attorney General (*Max F. Schutzman* and *Andrew P. Vance*, trial attorneys), for the defendant.

RE, Judge: The questions presented in this case, which involves nine entries, pertain to the valuation and classification of certain merchandise imported into the United States. The merchandise consists of three complete and four partial penstocks imported from Japan, and entered at Los Angeles, California from December 8, 1969 to October 7, 1971.

A penstock is a conduit or pipe for conducting water. As described by one of the witnesses, David Anderson, a mechanical design engineer with the Los Angeles Department of Water and Power, and contract administrator of the penstock contract under which the imported items were installed, it is—

> "* * * a large pipe carrying water from a resevoir [sic] or tunnel to a powerhouse for the purpose of power generation or, in the case of our project, also to carry the water from the powerhouse, pumping it uphill back into the reservoir. It's a pump-storage project." (R. 32.)

The penstocks, which were installed in the Castaic Power Plant in Castaic, California, were manufactured by Mitsubishi Heavy Industries, Ltd., Tokyo, Japan [MHI] for its parent company, Mitsubishi Shoji Kaisha, Ltd., Tokyo, Japan [MSK]. They were sold to plaintiff, a Los Angeles trading company also owned by MSK. Plaintiff had contracted to furnish the penstocks to Macias-Farwell, the successful bidder on a contract awarded by the Los Angeles Department of Water and Power for the construction of the Castaic power project.

The penstocks arrived in this country in packages or bundles described on the invoices as straight pipe, bent pipe, platform, bolt nut, reducer, fixed base plate, sliding base plate, bolt and washer, articulation joint, rocking beam assembly, support, bearing plate, test pieces, plate and X-ray film.

I. *The appraisement question presented*

On the valuation question, it is undisputed that the articles were separately appraised on the basis of constructed value as defined in

section 402(d), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956. The appraisements were at single unit values, net, packed. However, the appraised values, which appear in red ink on either the commercial or customs invoices are expressed, in some instances, only as totals of two or more articles without showing a separate appraised value for each item.

Constructed value is defined in section 402(d) as follows:

"(d) For the purposes of this section, the constructed value of imported merchandise shall be the sum of—

(1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise undergoing appraisement which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise undergoing appraisement which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for shipment to the United States; and

(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise undergoing appraisement in condition, packed ready for shipment to the United States."

The customs import specialist, Mrs. Lois A. Fields, who made the initial advisory appraisements, testified as to how she ascertained the elements of the constructed value for the merchandise. As part of the cost of materials and fabrication, she included an amount equal to the value of the "assists," which consisted of the drawings, blueprints and specifications supplied by the Los Angeles Department of Water and Power to prospective bidders on the penstock portion of the Castaic power project. She also included an amount for profit since she had "indications there was no profit in the invoice value."

It was stipulated that the issue on this phase of the case, is whether constructed value should include the value of the bid drawings represented by exhibits 1 and A. It was also stipulated that the visits of engineers from the Los Angeles Department of Water and Power to Japan were not considered part of constructed value. The bid drawings, blueprints and specifications (exhibits 1 and A) were sold to prospective bidders for $200, a figure presumably already included in the appraisements. That figure, however, is separate and distinct from the contested value assigned to the drawing by the import specialist and added to the cost of materials and fabrication.

Plaintiff, limiting its valuation claim to the bent pipe, articulation joints, reducers, sliding and fixed base plates, and test pieces, agrees that constructed value is the proper basis of appraisement, but contends that the correct constructed values are the "invoiced unit values." [1]

It is fundamental in customs law that the party challenging the official appraisement carries the dual burden of establishing that the presumptively correct appraised value is erroneous, and that the claimed value is correct. 28 U.S.C. § 2635; *Dana Perfumes Corp.* v. *United States*, 63 CCPA 43, C.A.D. 1162, 524 F. 2d 750 (1975). In an appropriate case, however, the so-called separability doctrine or rule, may relieve the contesting party of the burden of establishing every element of the claimed statutory value. This rule provides that if an appraisement is deemed separable, the importer may challenge any one or more of the items entering into the appraisement while relying upon the presumption of correctness as to all other elements of value, *United States* v. *Bud Berman Sportswear, Inc.*, 55 CCPA 28, C.A.D. 929 (1967); *United States* v. *Chadwick-Miller Importers, Inc., et al.*, 54 CCPA 93, C.A.D. 914 (1967); *United States* v. *Fritzsche Bros., Inc.*, 35 CCPA 60, C.A.D. 371 (1947).

Generally, an appraisement is separable where it is at the invoiced "first cost," *per se* price, or ex-factory price, plus various charges, but not where it is expressed at a single unitary price, such as an f.o.b. port of exportation price, unless there is proof in the record showing what the appraiser actually did. *United States* v. *Bud Berman Sportswear, Inc., supra; United States* v. *Chadwick-Miller Importers, Inc., supra; Concord Electronics Corp.* v. *United States*, 69 Cust. Ct. 241, A.R.D. 304, 345 F. Supp. 1000 (1972), *appeal dismissed*, 60 CCPA 185 (1972); *United States* v. *Dan Brechner et al.*, 38 Cust. Ct. 719, A.R.D. 71 (1957).

Thus, an appraisement is not separable merely because the appraised value is the mathematical equivalent of the invoice price plus charges or commission. *Haddad & Sons, Inc.* v. *United States*, 53 Cust. Ct. 423, R.D. 10825 (1964). Nor is it separable because it is equal to an invoiced c.i.f. price which included certain enumerated charges unless the record shows that such charges were included by the appraising officer in the *per se* appraised values. *Sharwell Bros. Shoe Co. et al.* v. *United States*, 61 Cust. Ct. 598, A.R.D. 244 (1968); *Luckytex, Ltd.* v. *United States*, 56 Cust. Ct. 575, R.D. 11119 (1965).

A constructed separation, however, may be effected if there is evidence to show that the appraising officer in fact calculated value by adding charges to or subtracting them from the invoice price.

[1] In its brief plaintiff urges that the constructed values should be the same as the "invoiced and entered values." As will be shown, the entered and invoiced values are not the same.

United States v. *Gehrig, Hoban & Co., Inc.* 54 CCPA 129, C.A.D. 924 (1967); *United States* v. *Louis Goldey Co., Inc.*, et al., 64 Cust. Ct. 868, A.R.D. 275 (1970), *appeal dismissed*, 58 CCPA 165 (1971). Hence, a unitary appraised value need not "remain inviolate" if it can be broken down into its component parts by satisfactory evidence. *United States* v. *Louis Goldey Co., Inc., et al. supra*, 64 Cust Ct. at 871; *United States* v. *Shalom & Co.*, 57 Cust. Ct. 767, A.R.D. 216 (1966), *appeal dismissed*, 55 CCPA 115 (1968).

In the present case, the cornerstone of plaintiff's claim is the alleged separability of the appraisements which, as noted, were at *per se* unit values. As indicated in its post trial brief, this claim is based upon the assumption that the appraising officer "*added* two amounts to the *invoiced values* * * *." (Emphasis added.) In plaintiff's words, it is challenging only the "*addition to invoiced values* made by the appraising officer for alleged assists and for profit * * *." (Emphasis added.) Consequently, plaintiff contends that the *invoiced* prices are the correct statutory constructed values, and contests only the alleged "additions" thereto.

The thrust of defendant's response is that separability may not be effected in this case because there is no breakdown of the "additions" to show how much was added for "assists" and how much for profit. Furthermore, defendant asserts that there is no showing that the advisory appraisements were accepted by the district director.

The basic problem, apparently overlooked by the parties, is that the evidence of record pertinent to separability, namely, the official papers (particularly the consumption entries and the commercial and special customs invoices) and the testimony of the import specialist, do not support plaintiff's premise or assumption that the appraised values were arrived at as alleged. Moreover, in some instances, plaintiff's contention would result in a value higher than the appraised value.[2]

A statement of the invoiced, entered and appraised values, as they appear on the pertinent documents, is necessary for an understanding of the legal issues presented. As for the invoice values, it is to be noted that the total c.i.f. values are listed on all the entries. The

[2] The notations on the summary sheets indicate that the entered values were advanced in appraisement. Defendant also seems uncertain as to what was done. While it states initially (brief at 1) that the import specialist testified that—

"* * * in rendering her advisory appraisement, she increased the *entered* values by adding thereto an amount equal to the value of assists supplied by the Los Angeles Department of Water and Power, and an amount equal to the profit which she felt had not been included in those *entered* values (R. 24-25) * * *." (Emphasis added.)

it subsequently asserts that she testified to adding (brief footnote 2 at 25)—

"* * * not one but *two* distinct amounts to the *invoice values*, i.e., an amount for engineering assists *and* an amount equivalent to the profit figure which she felt had been omitted therefrom. * * * the Court has absolutely no way of knowing what proportion of the total amount over and above the *invoice values* was allocated for assists, and what amount was assigned to profit." (Emphasis added to "invoice values.")

commercial invoices list a c.i.f. unit price in United States currency for each article except in the case of the following entries, on which a c.i.f. price is given for two or more articles without a breakdown for each item:

entry	207330	(articulation joint and reducer)
"	100339	(articulation joint and reducer; and fixed and sliding base plates)
"	167995	(articulation joint and reducer)
"	157425	(straight and bent pipe invoiced as "pipe"; reducer and test piece; and sliding and fixed base plates)

The special customs invoice accompanying entry 131567, which has no commercial invoice attached, lists a total c.i.f. price for fixed and sliding base plates.

The invoiced c.i.f. values also appear on the special customs invoices. Except for entry 167995 two "N/D" [nondutiable] charges are also listed: ocean freight and insurance premium. The entered (F.O.B. Japan) value is shown on these invoices as the total invoice value less the two nondutiable charges.

Concerning the merchandise in issue, only the total entered values are shown on entries 100339, 131567, 157425, 167995, 207330, and 105122. On the remaining three entries, while some articles are entered separately, at least two or more are entered together under a total value.

As to the appraisements, the court notes that in some instances single unit values were returned for individual items. In others, however, as previously indicated, *only total appraised values* are shown for two or more articles without a breakdown for each item. Thus, a separate value of $3,757 is listed for supports (an item not in issue) covered by entry 167995, while a total appraised value of $53,205 is shown for the articulation joints, reducers, rocking beam assemblies (not in issue) and bearing plates (not in issue) covered by that same entry.

The salient aspect of these appraisements is that, where appraised values are separately shown for particular items, the values in some instances are *less*, whereas in others they are *greater* than the *invoiced* unit values. For example, entry 131567, which covers the bent pipe, shows an invoice unit value of $8,100 and the lower appraised value of $7,366. On the other hand, the sliding and fixed base plates, which were invoiced at $8,853, were appraised at $9,599. These variations patently belie plaintiff's assertion that the appraisements were arrived at through the simple formula of making additions to the invoice values.

Furthermore, because some of the items in issue either were not separately invoiced or entered, or their appraised values were not

separately listed, the amounts by which they were advanced or increased in the appraisement (over either the invoiced or entered value) cannot be ascertained on this record. Moreover, the amounts included in the import specialist's calculations in those values for assists and profit also cannot be determined.

It cannot be questioned that the basic prerequisite for application of the separability doctrine is that the disputed charges be ascertainable. Thus, even assuming *arguendo*, the merits of plaintiff's substantive claim, there is nothing in this record [3] which would permit the court to make a proper finding of statutory constructed value as required by law.[4]

In finding that plaintiff has failed to establish its separability claim, the court has also considered the uncontroverted testimony of the import specialist that she separately appraised each of the disputed items; made separate findings as to the cost of materials and fabrication, which she assumed was not constant throughout the 1969–71 period; used separate figures in determining general expenses and profit; had not included a cost for containers as the merchandise was not packed; and that she had constructed the value of the merchandise in accordance with all reasonable ways and means available to her at the time. Thus, in making her advisory appraisements, the import specialist properly utilized all of the elements expressed in the statutory constructed value formula without regard to the invoiced and entered values.[5] In the absence of testimony, or other evidence, as to the specific costs or amounts entering into the findings of the import specialist, the advisory returns, assuming their adoption by the dis-

[3] For example, the bent pipe covered by entry 157425, was invoiced, together with straight pipe (not in issue) at one c.i.f. price of $8,194; entered, together with straight pipe, reducers, sliding and fixed base plates, test pieces and supports at $11,918; and appraised at $3,880. The invoice unit value for both reducers and test pieces is $4,100 and for the base plates is $2,000. But reducers, plates and test pieces are lumped together under a total appraised value of $5,723.

[4] The official papers were moved into evidence prior to the calling of the import specialist as a witness, and were retained by counsel for use during her testimony. They were not available to the court for its examination until the conclusion of the trial.

[5] The only testimony pertaining to the witness' method of including, or adding the disputed charges is found in the following colloquy (R. 24–25):

MR. GLAD: Now, did you add anything to your appraisement beyond that value which appeared on the invoices?

THE WITNESS: Yes.

MR. GLAD: And what was that?

MR. SCHUTZMAN: Objection, Your Honor. It is evident from the invoices how much she marked up the entered value.

JUDGE RE: It is evidently a mathematical computation. Why can't she give it if she knows it?

MR. GLAD: Please repeat the question.

(Whereupon, the question was read by the Court Reporter.)

THE WITNESS: There were two things [sic] I added to the materials and fabrication. [sic] An amount equal to assist applied [supplied?] by the Department of Water and Power.

MR. GLAD: And the second one?

THE WITNESS: The second one I made an addition which I felt was the equal to the profit which [sic] I had indications there was no profit in the invoice value.

In the context of the witness' entire testimony, it indicates that, in making the appraisements, she included amounts for assists and for profit which she believed were not reflected in the invoice values.

trict director, reflect a locked-in unit value structure incapable of fragmentation on this record.

Having failed to prove that the appraisements are separable, it became incumbent upon plaintiff to establish all the material elements of constructed value as set forth in section 402(d), *supra*. The evidence of record on this aspect of plaintiff's case does not require elaborate treatment. Since plaintiff had relied essentially on its separability claim, and devoted its efforts mainly to challenging the "additions" for assists and profits, it attempted to introduce testimony as to *estimates* of costs of materials and fabrication. Such testimony bears no relation to actual costs or the costs employed in producing such or similar merchandise at a time preceding the date of exportation of the articles. It is therefore without probative value in establishing the first element of statutory constructed value. In light of this failure of proof, it is unnecessary to consider the evidence adduced as to the other elements of plaintiff's claimed constructed values.

It is the determination of the court that the appraised constructed values are not separable, that plaintiff has failed to meet its statutory burden, and that the statutory constructed values of the merchandise at bar are the presumptively correct appraised values. Accordingly, the appraised values remain in full force and effect.

As stated previously several of the appraisements are expressed on the invoices only as totals of the appraised values returned for two or more items.[6] For example, the appraised values of the articulation joints are not separately stated, but are shown only as part of a combined total appraisement covering other articles. As will be indicated, the court's determination as to the proper classification of the articulation joints requires a separate return of value for the other articles included in those total appraisements so that the entries may be lawfully reliquidated.

II. *The classification question presented*

On the classification question, plaintiff has limited its claim to a) the articulation joints; b) the reducers; and c) the bent pipe.

The articulation joints and the reducers were classified under the basket provision for articles of iron or steel other than of cast iron or of tin plate, not coated or plated with precious metal, under item 657.20, TSUS, as modified by T.D. 68–9, and were assessed with

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[6] Plaintiff does not claim that the appraisements were erroneous on this ground, and as the import specialist testified that she had made separate findings of value for each article, it must be assumed that the articles were separately appraised at values which, when added together, equalled the total appraised values shown on the invoices. *Concord Electronics Corp. v. United States*, 69 Cust. Ct. 241, A.R.D. 304, 345 F. Supp. 1000 (1972), *appeal dismissed*, 60 CCPA 185 (1972). Of course, failure to make separate determinations of value would not have relieved plaintiff of the requirement of establishing affirmatively the correctness of the claimed values.

duty at the rate of 15.5, 13, or 11 per centum ad valorem, depending upon the date of entry.[7]

The bent pipe was classified as pipe fittings of iron or steel, other than cast iron, under item 610.80, TSUS, as modified by T.D. 68–9 and was assessed with duty at the rate of 15.5, 14, or 12.5 per centum ad valorem, depending upon the date of entry

Plaintiff contends that the articulation joints, the reducers, and the bent pipe are all properly classifiable under item 610.32, TSUS, as pipes and tubes of iron (except cast iron) or steel, other than alloy iron or steel, welded, jointed, or seamed, with walls not thinner than 0.065 inch, and circular cross section of 0.0375 inch or more in outside diameter. Hence, plaintiff maintains that the proper rate of duty should be 0.3 cent per pound.

While defending the official classification, the government contends, alternatively, that "should the Court determine that the reducers and articulation joints were erroneously classified, * * * proper classification in such a case would be under item 610.80, TSUS, *supra*, as pipe and tube fittings of iron or steel." [8]

The pertinent provisions of the tariff schedules read as follows:

Schedule 6, part 2, subpart B:

Classified:		
Bent pipe		
	"Pipe and tube fittings, of iron or steel:	
	* * * * * * *	
610.80	Other fittings	15.5%, 14%, 12.5% ad val."

Schedule 6, part 3, subpart G:

Articulation joints and reducers		
	"Articles of iron or steel, not coated or plated with precious metal:	
	* * * * * * *	
	Other articles:	
	* * * * * * *	
657.20	Other	15%, 13%, 11% ad val."

[7] The correct rate of duty for merchandise entered for consumption during 1969 and classified under item 657.20, as modified by T.D. 68–9, was 15%, not 15.5%. The reducers entered during the period were improperly assessed at the 15.5% duty rate. However, plaintiff has made no claim with respect to this error.

[8] Whereas item 657.20, under which the reducers and articulation joints were classified, is a general or basket provision, item 610.80 is a more specific provision. See General Interpretative Rule 10(c). Although defendant failed to amend its answer to include its alternative claim, in the spirit of rule 4.8(b) the amendment is hereby deemed to have been made.

Claimed:

Schedule 6, part 2, subpart B:

	"Pipes and tubes and blanks therefor, all the foregoing of iron (except cast iron) or steel: Welded, jointed, or seamed, with walls not thinner than 0.065 inch, and of circular cross section: Other than alloy iron or steel:	
*	* * * * * * *	
610.32	0.375 inch or more in outside diameter----------	0.3¢ per lb."

In customs classification cases, plaintiff has the dual burden of establishing that the presumptively correct classification of the customs officials is incorrect, and that the claimed classification is proper. See 28 U.S.C. § 2635; *United States* v. *L. Batlin & Son, Inc.*, 61 CCPA 17, C.A.D. 1111, 487 F. 2d 916 (1973). As a consequence of this statutory presumption, and firmly established judicial authority, plaintiff's protest must fail unless it affirmatively establishes that its claimed classification for the merchandise is correct.

In order that the articulation joints, reducers and bent pipe come within the purview of item 610.32, TSUS, they must initially meet the following criteria:

1. Be welded, jointed or seamed.
2. Have walls not thinner than 0.065 inch.
3. Have circular cross section.
4. Be other than alloy iron or steel.
5. Be 0.375 inch or more in outside diameter.

The undisputed testimony of plaintiff's witness, Mr. Takahashi, chief engineer at MHI, who has designed penstocks and worked on the designs used in manufacturing the penstocks at bar, establishes that the articles are welded, have walls not thinner than 0.065 inch and are 0.375 inch or more in outside diameter.[9] The exhibits of the specifications and photographs of the penstocks show that they also have a circular cross section. The articles are made of "normalized steel" which comports with the requirements set out by the Los Angeles Department of Water and Power in its bid specifications for manufacture of the Castaic penstocks. The chemical composition of the steel is shown in the specifications prepared by MHI. A comparison of this data with the definition of "alloy iron or steel" set forth in headnote 2(h) of schedule 6, part 2, subpart B, satisfies the court

[9] The witness testified that the articles have a minimum diameter of 60 inches and that the walls of all the items herein have a minimum thickness of ⅜ inch. See also plaintiff's [collective] exhibit 11; "Record of Welding Procedure Qualification Test" and "Record of Welder Performance Qualification Test" prepared by MHI in connection with the manufacture of the articles.

that the imported merchandise is not alloy iron or steel.[10] Hence, the court finds that plaintiff has met the initial criteria for classification of the controverted merchandise under item 610.32, TSUS.

Three of the five witnesses called by plaintiff gave testimony bearing on its classification claim. In addition to Messrs. Anderson and Takahashi, the third witness was Mr. Taiji Owada, general manager of the machinery department of Mitsubishi Corporation of Japan, Osaka branch, who has bought and sold pipe for 15 to 20 years. He dealt in pipe in the United States from 1967 through 1973 when he was assistant manager and subsequently manager of plaintiff's machinery department in Los Angeles.

Defendant recalled Mr. David Anderson as its own witness, and also called two others. The first was Mr. Gail S. Preston, a civil engineer and supervisor since 1969 of a group responsible for the design, manufacture and construction engineering of plate work, including pipe and penstocks, for the American Bridge Division of the United States Steel Corporation in Los Angeles. The second was Mr. Robert Moehle, a civil engineer employed by the Water District of Southern California for 22 years, who has worked on pipe, but not on penstocks.

Although the opinion testimony of the witnesses differed on whether the articles are pipe or pipe fittings, there was no dispute as to their physical shape, or the function they serve in the Castaic penstock system.

The articulation joint, as imported, according to the witness Anderson, consists of a "straight piece of pipe" with two ring girders welded thereon. The ring girders, which are also present on all the imported and invoiced straight pipe (not in issue in this case), serve to support the pipe, and to withstand the pressure and weight of the water.

After importation, the articulation joint is connected by means of articulation couplings to adjacent pieces of pipe. The couplings are supplied by Dresser Industries, a domestic concern located in Pennsylvania. The function of the articulation joint and attached couplings,

[10] Exhibit 8, p. 2, Table 1, lists the chemical requirements of the steel, as follows:

	Ladle Analysis	Check Analysis
	%	%
Carbon, Max.	0.22	0.24
Manganese	0.70 Min.	0.65 Min.
	1.50 Max.	1.55 Max.
Phosphorus, Max.	0.035	0.045
Sulphur, Max.	0.040	0.050
Silicon	0.15 Min.	0.13 Min.
	0.50 Max.	0.55 Max.
Copper, Max.	0.20	0.20
Vanadium, Max.	0.080	0.080

The percentages of the foregoing elements are below the figures set forth in headnote 2(b), *supra*, for establishing that the material is alloy iron or steel.

which are located in the powerhouse, is to allow for longitudinal movement between the adjacent pipe sections, and for angular deflection if the powerhouse were to shift. The couplings permit the relative displacement of these sections without leakage of water.

The reducers were described by Mr. Anderson as "short sections of pipe with a diameter upstream larger than the diameter downstream." Of the nine reducers contained in these shipments, two have a 6-inch reduction in diameter over a 9-foot length; six have a reduction of 6 feet, 2 inches over a length of 24 feet, 6 inches; and one has a diameter reduction of 1 foot over a length of 11 feet, 6 inches. The purpose of the reducers is to reduce the water pressure, thereby keeping the maximum wall thickness of the pipe down to under 2 inches. As the thickness of the pipe is directly proportionate to its diameter for a given pressure, reducing the diameter downstream reduces the pressure and the necessity of increasing wall thickness.

The articles invoiced as "bent pipe" are made up of several pieces of straight pipe fitted together in a manner that will form a bend. The maximum angle of bend in these articles is 60 degrees and 2 minutes, and the minimum angle of bend is 4 degrees, 2 minutes and 15 seconds. These articles allow the penstock to follow the contours of the hillside on which the penstock system is built. The bent pipe, like much of the straight pipe, is imported with stiffener rings. These rings serve to stiffen the wall of the pipe, to protect it from destructive vibration, and to withstand external pressure.

Mr. Anderson testified that the addition or presence of ring girders and stiffeners does not make pipe anything more than pipe. Mr. Owada stated that the definition for pipe in the trade in Japan is no different from that in the United States; that pipes are used to convey liquids and gases from one place to another; and that, in his opinion, the articles in issue are pipe. Mr. Takahashi stated that a penstock is a pipe.

Mr. Preston testified that a pipe fitting is something that changes the pipe's diameter or alignment, i.e., changes the directional flow; and that the bent pipe and reducers, shown on plates PA 103 and PA 106 in exhibit 1, are fittings. Although acknowledging that bent pipe changes the directional flow in a pipe system, he stated that bent pipe, which is made from bending a piece of straight pipe, is still a pipe.

According to Mr. Moehle, pipe fittings are pieces which "require additional fabrication other than the pipe itself." He considers the reducers and bent pipe, depicted on plates PA 103 and PA 106, to be fittings.

Plaintiff contends that it has established that the controverted articles, whether straight, bent or reduced in diameter at one end,

come within the common meaning of pipes and tubes, and are therefore within the ambit of item 610.32. Defendant, on the other hand, claims that the record proves that the bent pipe was properly classified as pipe and tube fittings under item 610.80, and that the reducers and articulation joints, by virtue of their physical characteristics, have passed beyond the stage of mere pipe. Thus, defendant urges that they are not within the purview of the "pipe" provision. Without abandoning the official classification, defendant has also endeavored to establish their classification as pipe and tube fittings under item 610.80.

It is settled that, absent a contrary legislative intent, the common meaning of a term controls the construction and interpretation of the tariff statutes. The common meaning of a tariff term is a question of law for the court to decide. In making its determination the court may consider the testimony of witnesses, which is advisory only, and may consult lexicographic and other authorities. See *United States* v. *O. Brager-Larsen*, 36 CCPA 1, C.A.D. 388 (1948); *Nomura (America) Corp.* v. *United States*, 62 Cust. Ct. 524, C.D. 3820, 299 F. Supp. 535 (1969), *aff'd*, 58 CCPA 82, C.A.D. 1007, 435 F. 2d 1319 (1971); *Mattel, Inc.* v. *United States*, 76 Cust. Ct. 84, C.D. 4639 (1976); *Border Brokerage Company, Inc.* v. *United States*, 60 Cust. Ct. 87, C.D. 3270, 279 F. Supp. 157 (1968).

a) *The articulation joints*

As for the articles invoiced as articulation joints, it is apparent that this appellation is a misnomer when applied to the merchandise in its condition *as imported*. The article, as evidenced by the drawings in exhibit 1 and the record testimony,[11] was imported in the form of straight pipe. It was thereafter attached at either end to domestically produced articulation couplings for use as previously described in the penstock system. That after importation the article as assembled might constitute something other or more than pipe is not determinative of the tariff classification of the imported article. It is fundamental in customs law that the classification of imported merchandise is determined by its condition as imported. As stated by Mr. Justice Hughes, "[t]he inquiry must be—Does the article, as imported, fall within the description sought to be applied?" *United States* v. *Citroen*, 223 U.S. 407, 414, 32 S. Ct. 259 (1912). See also *United States* v. *Baker, Perkins, Inc., et al.*, 46 CCPA 128, C.A.D. 714 (1959); *Hurricane Import Co. et al.* v. *United States*, 58 Cust. Ct. 541, C.D. 3046 (1967).

[11] According to the undisputed testimony of Mr. Anderson, "[w]ithout the articulation coupling, we have no articulation joint," and "[t]his piece of pipe in here [the imported articulation joint] is the same as any other piece of penstock pipe."

On this record, it is clear that the so-called articulation joints are merely "pipe." The ring girders, also present on the invoiced straight pipe (not in issue), which had been classified as "pipe," merely support the pipe and enable it to withstand the pressures and weight of the pipe and water. They do not endow it with the capability of a new or different function. The ring girders are readily distinguishable from the fins on the economizer tubes in the case of *E. Green & Son (New York), Inc.* v. *United States*, 59 CCPA 31, C.A.D. 1032, 450 F. 2d 1396 (1971). In the *E. Green* case, the fins enabled the economizer tubes to accomplish the additional function of heating or cooling water flowing through them, thus making the imported articles something more than mere pipes or tubes.

It is, therefore, the determination of the court that the articulation joints are "pipe" within the meaning of the claimed tariff provision. Under the applicable rule of relative specificity, it is properly classifiable under item 610.32, as claimed, rather than under the more general basket provision of item 657.20, as classified. See General Interpretative Rule 10(c).

b) *The reducers*

The imported *reducers*, on the other hand, have as their primary function not merely the conveyance of water, but the *reduction* of water pressure on the downstream section of the penstock. This attribute causes the reducers to come within the reasoning of the *E. Green* case, *supra*, wherein the appellate court stated:

> "* * * We are particularly impressed by exhibit 1, which is a section of an economizer tube of the type imported. It is hard to see how such an article can be considered a "pipe" or "tube" of any description. It does not look like a pipe or tube in its shape and form, and, more importantly, its major function is not that of a pipe or tube. That is, the record establishes that while the economizer tubes do convey water, their primary function is to heat or cool the water flowing through their interior. The finned design of the economizer tubes was created solely to accomplish this function, and thus represents something more than a pipe or tube as those terms are commonly defined." 59 CCPA at 35.

It is clear from the foregoing that the reducers are more than pipes or tubes. Plaintiff is therefore in error in its claim that they are properly classifiable under item 610.32 as pipes and tubes of iron.

The defendant has alternatively claimed classification of the reducers under item 610.80 as pipe fittings. Thus, the court is requested to find a classification neither found by the customs officials nor raised by the plaintiff.

The protest in this case is filed pursuant to the provisions of section

514 of the Tariff Act of 1930, as amended.[12] A protest is the final declaration by which the importer communicates his objections to the customs officials. See *United States* v. *Lian*, 19 F. 2d 41, 42 (2d Cir. 1925). It also serves to establish the limits of the action instituted in this court under the provisions of 28 U.S.C. § 1582(a) (1970). Thus, the court may not render a judgment which would reclassify the merchandise beyond the limits of the issues as framed by the protest. See *In re Solvay Process Co.*, 134 F. 678 (C.C.N.D.N.Y. 1905).

In considering the defendant's alternative claim, the court notes the following:

Audels Mechanical Dictionary (1942) defines "pipe fittings" as follows:

> "Connections, appliances, and adjuncts designed to be used in connection with iron pipes, such as *elbows* and *bends* to alter the direction of a pipe; *tees* and *crosses* to connect a branch with a main; *plugs* to close an end; *bushings*, *diminishers* or *reducing sockets* to couple to pipes of different dimensions, etc." (Emphasis in original.)

Knight's New American Mechanical Dictionary (1883) defines a "pipe reducer" as follows:

> "A pipe coupling which is larger at one end than the other, to unite pipes of different diameters."

The *Dictionary of Mechanical Engineering*, Del Vecchio (1961), defines "fittings" as—

> "Parts of a pipe line other than straight pipe or valves, such as couplings, elbows, tees, unions and increasers."

Defendant's exhibit C, "AWWA Standard for Dimensions for Steel Water Pipe Fittings," 1959, published by the American Water Works Association, lists the various dimensions for fittings, including reducers, for service in piping systems in water works. Similarly, the section on pipe fittings (at 1077–99) in the *Mechanical Engineers' Handbook*, Marks (1941), also lists the dimensions for reducers. The *Summaries of Tariff Information* (1948), Volume 3, part 2, at 183, in a discussion of the cast-iron pipe fittings provision in paragraph 327 of the Tariff Act of 1930, state:

> "Cast-iron fittings for cast-iron pipe consist of the curves, joints, tees, reducers, etc., used as connections in cast-iron-pipe systems."

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[12] Section 514 of the Tariff Act of 1930, as amended (19 U.S.C. § 1514 (1970)):

SEC. 514. FINALITY OF DECISIONS: PROTESTS.

(a) Finality of Decisions * * * decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to * * *

(2) the classification and rate and amount of duties chargeable * * *

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest in whole or in part, is commenced in the United States Customs Court * * *.

As was observed in *L & B Products Corp.* v. *United States*, 66 Cust. Ct. 424, C.D. 4228 (1971), this court, in *Mitsubishi Shoji Kaisha, Ltd.* v. *United States*, 72 Treas. Dec. 500, T.D. 49226 (1937), held that "malleable iron pipe fittings comprising reducers, bushings, plugs, elbows, tees, couplings, etc." were within the *eo nomine* provision in paragraph 327 of the Tariff Act of 1930 for "cast-iron fittings for cast-iron pipe."

The reducers were classified under item 657.20, a general or basket provision for articles of iron or steel. Item 610.80, which covers pipe fittings, is admittedly a more specific provision. The reducers, therefore, in accordance with General Interpretative Rule 10(c), should have been classified under item 610.80, the more specific provision, and the provision under which the defendant makes its alternative claim. As previously noted, however, the classification controversy before the court is limited by the plaintiff's protest. Indeed, it has been said that the function of the court in such a case is to "pass upon the correctness of the allegations of the protest, rather than on the merits of the case * * *." *In re Solvay Process Co., supra* at 680.[13]

Since plaintiff has failed to establish its claim that the reducers were pipes and tubes under item 610.32, TSUS, its claim is overruled without affirming the classification.

c) *The bent pipes*

Finally, as to the bent pipes, which have angles of bend ranging from approximately 4 to 60 degrees, it is noted that, although they carry water, their primary function is to allow the penstock "to obtain the contours of the hillside on which this penstock system was built." In other words, they are used to change the plane of the pipe line in order to follow the terrain. Thus, they serve the essential function of altering the direction of flow as required by the nature of the situs.

In this respect they are comparable to elbows, which have long been recognized as fittings by the dictionary definitions cited, and also by judicial decisions. *Herbert B. Moller and U.S. Wolfson Bros. Corp.* v. *United States*, 46 CCPA 89, C.A.D. 704 (1959); *Green Kay Corp. et. al.* v. *United States*, 29 CCPA 216, C.A.D. 193 (1942); *United States* v. *Grinnell Co.*, 16 Ct. Cust. Appls. 255, T.D. 42844 (1928); *Border Brokerage Company, Inc.* v. *United States, supra; Mitsubishi Shoji Kaisha, Ltd.* v. *United States, supra*. For example, the court is unable to discern any substantial difference between the sectional bent pipes in issue, which are depicted on the drawings in exhibit 1, and the 2-, 3- and 4-piece elbows that are shown on the AWWA dimension

[13] See also *J. E. Bernard & Co., Inc.* v. *United States*, 64 Cust. Ct. 525, 527, C.D. 4029 (1970), *appeal dismissed*, 58 CCPA 165 (1970). Defendant's claim for an alternative classification in that case was recognized by the court to be "without the possibility of obtaining an affirmative judgment for a higher rate of duty."

specifications comprising exhibit C, and which have angles ranging from 0–30, 31–60 and 61–90 degrees. Indeed, both articles serve the the same function of altering the directional flow of water in a pipe line. Hence, it is the conclusion of the court that these articles are more than mere "pipe," and are therefore not within the purview of the claimed pipe provision. *E. Green & Son (New York), Inc.* v. *United States, supra*. Accordingly, their classification as pipe fittings under item 610.80 is affirmed.[14]

In summary, for the reasons stated, a) plaintiff's claim for classification of the articulation joints as pipes or tubes under item 610.32, TSUS, is sustained; b) since the reducers are properly classifiable as pipe fittings under item 610.80, TSUS, plaintiff's claim for their classification under item 610.32, TSUS, is dismissed without affirming the official classification; and c) plaintiff's claim for classification of the bent pipe as pipes or tubes under item 610.32, TSUS, is also dismissed.

The foregoing determinations would normally conclude the questions raised except for the fact that the articulation joints, which were classified under item 657.20 at 13 per centum ad valorem, are to be reclassified in reliquidation under item 610.32 which carries a duty rate of 0.3 cent per pound. However, only total appraised values are shown on the invoices accompanying entries 167995, 207330 and 100339 for the articulation joints and all other articles which had been classified under item 657.20 and assessed at 13 per centum ad valorem.[15] Inasmuch as the other articles included in those total appraisements were properly assessed on the ad valorem basis, but the articulation joints are to be assessed on a per pound basis, the total appraised constructed values of the other articles must now be shown in order to reliquidate the entries properly.

Therefore, plaintiff's claim as to the appraisements is dismissed, and the disputed appraised values are affirmed except for the aforementioned total appraised values shown on entries 167995, 207330 and 100339. With respect to these three entries, the case is to be remanded for further disposition.

The parties are hereby ordered, within 30 days after entry of the judgment and order herein, to file with the court a joint statement

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[14] Plaintiff's reliance on *Davis-Bilt Products Co.* v. *United States*, 28 Cust. Ct. 332, C.D. 1432 (1952), is misplaced. That case involved circular steel tubes which *after* importation, were cut into bends of varying degrees and then welded to straight lengths of tubing. It is quite clear that in their condition as imported the tubes did not constitute fittings. Furthermore, their classification as fittings was an issue never raised or considered. See *Herbert B. Moller and U.S. Wolfson Bros. Corp.* v. *United States, supra*; *Border Brokerage Company, Inc.* v. *United States, supra*.

[15] Entry 167995 shows only a total appraised value of $53,205, net, packed, for the articulation joints, reducers, rocking beam assemblies and bearing plates; 207330, $74,777 for the articulation joints, reducers and rocking beam assemblies; 100339, $75,998 for the articulation joints, reducers, and sliding and fixed base plates.

setting forth the total appraised constructed values of the (1) reducers, rocking beam assemblies and bearing plates covered by entry 167995; (2) reducers and rocking beam assemblies covered by entry 207330; and (3) reducers and sliding and fixed base plates covered by entry 100339. In the event that the parties advise the court of their inability to agree upon a joint statement, the matter shall be heard forthwith for the sole purpose of determining the appraised constructed values of the articles hereinbefore described.

Judgment will be entered accordingly.[16]

(C.D. 4687)

THE WESTMINSTER CORP. *v.* UNITED STATES

Vinyl shoe uppers

Court No. 73-7-01717

Port of Baltimore

[Judgment for plaintiff.]

(Decided January 31, 1977)

Donohue & Donohue (*James A. Geraghty* of counsel) for the plaintiff.

Irving Jaffe, Acting Assistant Attorney General (*Bruce M. Mitchell*, trial attorney), for the defendant.

FORD, Judge: This matter is before the court by virtue of a motion for summary judgment made by plaintiff pursuant to rule 8.2 of the rules of this court. Defendant filed a cross-motion for summary judgment and for dismissal of protest 1303-2-000623 as to certain entries as being filed more than 90 days after the date of liquidation. Plaintiff then requested and the court granted a motion for oral argument. The issue for determination is the proper classification of certain vinyl uppers, intended for use and actually used as footwear for children after being subjected to manufacturing which is described *infra*. Customs classified the merchandise under item 772.30 of the Tariff Schedules of the United States as wearing apparel not specially provided for, of rubber or plastics. Plaintiff contends said merchandise to be properly subject to classification under item 700.55, TSUS, as modified by T.D. 68-9, as footwear having uppers of rubber or plastics. Alternatively plaintiff claims under item 791.25 TSUS, as modified, *supra*, as leather cut or wholly or partly manufactured into forms or shapes suitable for conversion into footwear, by virtue of the

[16] The official papers in entries 167995, 207330 and 100339 shall be retained by the court until the final disposition of all matters herein.

similitude provision set forth in item 798.00, TSUS, or under item 774.60, TSUS, as modified, *supra*, as articles not specially provided for, of rubber or plastics.

The pertinent statutory provisions involved are as follows:

General Headnotes and Rules of Interpretation:

10. General Interpretative Rules. For the purposes of these schedules—

* * * * * * *

(c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it * * *;

* * * * * * *

(h) unless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished;

Tariff Schedules of the United States:

SCHEDULE 7. – SPECIFIED PRODUCTS; MISCELLANEOUS AND NONENUMERATED PRODUCTS

PART 1. – FOOTWEAR; HEADWEAR AND HAT BRAIDS; GLOVES; LUGGAGE, HANDBAGS, BILLFOLDS, AND OTHER FLAT GOODS

Subpart A. – Footwear

* * * * * * *		
	Footwear (whether or not described elsewhere in this subpart) which is over 50 percent by weight of rubber or plastics or over 50 percent by weight of fibers and rubber or plastics with at least 10 percent by weight being rubber or plastics:	
* * * * * * *		
	Other footwear (except footwear having uppers of which over 50 percent of the exterior surface area is leather):	
700.55	Having uppers of which over 90 percent of the exterior surface is rubber or plastics (except footwear having foxing or a foxing-like band applied or molded at the sole and overlapping the upper)----------	6% ad val.
* * * * * * *		

PART 12. – RUBBER AND PLASTICS PRODUCTS

Subpart C. – Specified Rubber and Plastics Products

*	*	*
772.30	Wearing apparel (including rainwear) not specially provided for, of rubber or plastics	12.5% ad val.
*	*	*

Subpart D. – Articles Not Specially Provided For of Rubber or Plastics

	Articles not specially provided for, of rubber or plastics:	
*	*	*
774.60	Other	8.5% ad val.
*	*	*

PART 13. – PRODUCTS NOT ELSEWHERE ENUMERATED

Subpart B. – Articles of Fur and of Leather

*	*	*
	Leather cut or wholly or partly manufactured into forms or shapes suitable for conversion into footwear:	
*	*	*
791.25	Other	5% ad val.
*	*	*

PART 14. – NONENUMERATED PRODUCTS

	Any article, not provided for elsewhere in these schedules:	
	Which is similar in the use to which it may be applied to any article or articles enumerated in any of the foregoing provisions of these schedules as chargeable with duty:	
798.00	Most resembling as to use a particular enumerated article chargeable with duty	The same rate of duty as the particular enumerated article which it most resembles as to use

Plaintiff has abandoned the following entries covered by two of the protests originally filed herein:

entry 125473 of protest 1303–3–000158
entry 131240 of protest 1303–2–000623
entry 140613 of protest 1303–2–000623
entry 141134 of protest 1303–2–000623
entry 141135 of protest 1303–2–000623
entry 141137 of protest 1303–2–000623
entry 141158 of protest 1303–2–000623
entry 141164 of protest 1303–2–000623
entry 141165 of protest 1303–2–000623

Claims relating to these entries having been abandoned are hereby dismissed.

The parties are in agreement that there are no triable issues of fact. This matter is therefore ripe for summary judgment. The facts agreed upon are as follows:

1. The articles of merchandise, in their condition as imported, are in chief value of plastics materials.
2. The articles were used by plaintiff at its shoe factory in Westminster, Maryland in the manufacture of footwear.
3. After importation, the articles were subjected to the following processes

a) a counter pocket was sewn thereon;
b) a box toe was affixed thereto;
c) the articles were bonis stitched;
d) a plastic sole and heel were injection molded;
e) an innersole was inserted.

4. The articles as imported were missing box toes, soles, heels, and innersoles which were added before the merchandise was ready for polishing and packing.

The primary issue presented is unique inasmuch as the classification is under item 772.30, *supra*, as wearing apparel, which defendant contends encompasses parts. Plaintiff contends said merchandise is footwear under item 700.55, *supra*, either as parts or unfinished. Neither item contains a parts provision. It is self-evident without the necessity of resorting to dictionary definitions that footwear is a form of wearing apparel for the feet. This court in *Bata Shoe Co., Inc.* v. *United States*, 6 Cust. Ct. 50, C.D. 423 (1941) held wearing apparel to be a use provision. This being so it naturally follows that wearing apparel for the feet, i.e., footwear, is likewise a use provision. The provision for footwear being more specific than wearing apparel should prevail under General Interpretative Rule 10(c) if properly subject to classification in either provision. Even if this were not the case, under the same conditions, the provision for footwear would necessarily prevail by virtue of the fact that wearing apparel contains an n.s.p.f. clause while the provision for footwear does not. Under settled case law the presence of an n.s.p.f. clause makes said provision less specific

in the absence of a contrary legislative intent. *United States* v. *Lansen-Naeve Corp.*, 44 CCPA 31, C.A.D. 632 (1957); *United States* v. *Alltransport, Inc.*, 44 CCPA 149, C.A.D. 653 (1957); *Jack and Jill Togs, Inc.* v. *United States*, 47 CCPA 149, C.A.D. 749 (1960).

The inclusion of parts of wearing apparel in *Bata* relied upon by defendant is not controlling in the instant case. The provisions of paragraph 919 of the Tariff Act of 1930 involved therein provided "manufactured * * * in part" whereas item 772.30 does not include such language. In *Bata* the finding of the court was not as parts of wearing apparel but as "cotton wearing apparel manufactured in part."

Similarly *Jack Bryan, Inc.* v. *United States*, 72 Cust. Ct. 197, C.D. 4541 (1974) relied upon by defendant as being directly in point is also distinguishable. The finding in *Bryan* was wearing apparel unfinished and unassembled which is included under item 772.30 by virtue of General Interpretative Rule 10(h). The court therefore finds no support to permit a holding of parts of wearing apparel.

As indicated, *supra*, neither item 772.30 nor item 700.55, *supra*, contains a parts provision. It is well settled law that an *eo nomine* provision which does not specifically provide for parts does not include parts. See *A Manual of Customs Law* by Ruth F. Sturm, *Murphy & Co. et al.* v. *United States*, 13 Ct. Cust. Appls. 256, T.D. 41201 (1925); *United States* v. *Draeger Shipping Co.*, 18 CCPA 308, T.D. 44561 (1931); *Herman Miller Clock Co.* v. *United States*, 22 CCPA 332, T.D. 47363 (1934); *United States* v. *Lyons Transport*, 45 CCPA 104, C.A.D. 681 (1958). As far as can be ascertained by research including legislative history there appears to be no similar findings with respect to use provisions. The court is of the opinion that where a provision does not contain a "parts clause" whether it be *eo nomine* or use, parts may not be included thereunder. Congress might well in enacting this legislation have provided for parts in either provision if it had so intended. It did not.

The next question for consideration is whether the imported merchandise consists of unfinished footwear. In *Authentic Furniture Products, Inc.* v. *United States*, 61 CCPA 5, C.A.D. 1109 (1973) the appellate court held that parts of an article may be classified as an unfinished article only when the imported pieces constituted a substantially complete article. In the case at bar as indicated, *supra*, the additional work and materials necessary for a complete shoe are substantial. Accordingly, the uppers involved herein do not constitute an unfinished article under either item 772.30 or 700.55, *supra*. The cases relied upon by plaintiff, *Abercrombie & Fitch Co.*, 10 Cust. Ct. 382, Abs. 47958 (1943) and *Hurricane Import Co. et al.* v. *United States*,

58 Cust. Ct. 541. C.D. 3046 (1967) do not support its contention. In both cases the paragraphs involved contained a provision for parts as well as one for partly finished items set forth in the respective provisions.

Plaintiff's alternative claim under item 791.25, *supra*, by virtue of item 798.00, *supra*, as leather manufactured into forms or shapes suitable for conversion into footwear by similitude is likewise not applicable.

The law under prior acts is well settled that an article is enumerated if it comes within a class made dutiable by the terms of the act including basket clause provisions in the same manner as if it were provided for *eo nomine*. *United States* v. *Cochran & Co.*, 3 Ct. Cust. Appls. 57, T.D. 32349 (1912); *United States* v. *Wecolite*, 45 CCPA 54, C.A.D. 672 (1958); *S.S. Kresge Co., et al.* v. *United States*, 46 CCPA 100, C.A.D. 707 (1959); *Atlantic Linen Importing Co.* v. *United States*, 62 Cust. Ct. 725, C.D. 3854 (1969). It is to be noted the language of similitude provisions in the Tariff Act of 1930 and TSUS is not identical. In fact the change of language is significant.

> The language of such provisions is as follows:
>
> Paragraph 1559, Tariff Act of 1930:
>
> * * * That each and every imported article, *not enumerated in this Act* * * * shall be subject to the same rate of duty which is levied on the enumerated article which it most resembles * * *. [Emphasis supplied.]
>
> Item 798.00, TSUS:
>
> Any article, *not provided for elsewhere in these schedules:* Which is similar * * * to any article or articles enumerated in any of the foregoing provisions of these schedules * * *. [Emphasis supplied.]

Paragraph 1559 utilizes the phrase "not enumerated in this Act" while item 798.00 provides for "not provided for elsewhere in these schedules." While the case law under the language of paragraph 1559, *supra*, would exclude the application of similitude in a situation such as is involved herein the present language of item 798.00 is even stronger and will also prohibit the application of similitude. The language "not provided for" is a broader phrase than "not enumerated" and would also include a basket provision if there were not a specific provision for the article itself. Therefore the similitude provision is not applicable herein.

The court agrees with the parties that if the classification is incorrect and the primary and secondary claims of plaintiff are denied then the proper classification is under item 774.60.

Accordingly, plaintiff's motion for summary judgment, to the extent indicated above, is granted. In all other respects, plaintiff's motion and defendant's cross-motion are denied.

Judgment will be entered accordingly.

(C.D. 4688)

IDEAL TOY CORP. *v.* UNITED STATES

Inflatable floats—Toys

The imported article, described on the invoices as "inflatable baby tender chair" or "Ideal's Baby-Me Play Float," was classified as a toy under TSUS item 737.90. Plaintiff claims the imported article is properly classifiable under the tariff provision for pneumatic mattresses and other inflatable articles, not specially provided for, dutiable under TSUS item 790.39.

Except for nuances in the differing opinions on the question of whether the "Baby-Me Play Float" is a toy or not a toy, the testimony does nothing more than cumulatively corroborate the purpose of the play float stated and depicted on the container in which it is sold. The container shows a mother attending baby seated in the play float playing in the water.

Plaintiff's case (that the play float is not a toy, chiefly used for the amusement of children or adults) ultimately rests on the argument that the use of the play float is chiefly utilitarian because the baby does not play with the float and, for all practical purposes, the play float does nothing more than it was designed to do, support the baby in the water.

An article classified as a toy does not have to be a plaything, that is, it does not have to be played with, provided the quality of emotion induced by the article or use of the article takes on the character of frivolous amusement derived from an article which is essentially a plaything. *United States* v. *Topps Chewing Gum, Inc.*, 58 CCPA 157, 159, C.A.D. 1022, 440 F. 2d 1384 (1971).

The record clearly establishes that the emotion induced in a child of six months to two years of age seated in the play float in the water is amusement. The child splashes the water, paddles its feet, and responds in improvised play with an interacting parent or adult. Moreover, the utility of the inflatable article in this case and the amusement associated with it are not mutually exclusive uses. The customs classification as a "toy" is cumulatively buttressed by the evidence that the play float is obviously directed to a child's fantasies; that it is called a toy, trademarked as a toy, and sold in toy departments at retail.

HELD. Plaintiff having failed to establish that the chief use of the imported play float was other than amusement, the presumption of correctness attaching to the classification by customs was not overcome.

Court Nos. 71-6-00211, etc.

Ports of New York
Baltimore
Houston
Boston
Savannah
Los Angeles

[Judgment for defendant.]

(Decided February 7, 1977)

Sharretts, Paley, Carter & Blauvelt (*Patrick D. Gill* and *M. Barry Levy* of counsel) for the plaintiff.

Irving Jaffe, Acting Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

LANDIS, Judge: These consolidated actions [1] involve the question of whether an inflatable article described on the invoices as "inflatable baby tender chair" or "Ideal's Baby-Me Play Float" was properly classified by customs officials as a toy, dutiable under TSUS item 737.90 at various rates depending on the date of entry,[2] or should be classified as plaintiff claims, as an article of the class or kind properly classifiable under the tariff provision for pneumatic mattresses and other inflatable articles, not specially provided for, under TSUS item 790.39, also at various rates.[3]

The imported articles are one and the same article manufactured and exported from Japan. They were imported at the ports of New York, Baltimore, Houston, Boston, Savannah and Los Angeles.

Responding to the request by plaintiff for admissions, defendant has admitted that the imported articles are inflatables and concedes that if not dutiable as toys, then the inflatables are properly dutiable as inflatable articles, not specially provided for. In the context of those admissions, the only issue in this case is whether the imported inflatables are "toys." As defined in the tariff schedules (schedule 7, part 5, subpart E, headnote 2), a toy "is any article chiefly used for the amusement of children or adults." Customs officials are presumed to have found each and every fact necessary to support the presumption [4] that the chief purpose of the imported inflatables is amusement. *E. I. du Pont de Nemours & Co.* v. *United States*, 27 CCPA 146, 149, C.A.D. 75 (1939). Plaintiff's burden is to prove that the chief purpose

[1] On written motions, ten actions were consolidated for trial, without objection.

[2] Duty was assessed under TSUS item 737.90 at the following rates: 21% (1971) and 17.5% (1972 and post-1972).

[3] The rates of duty claimed under TSUS item 790.39 are: 7% (1971) and 6% (1972 and post-1972). Plaintiff has abandoned the claims set forth in the complaint under TSUS items 774.60 and 727.48. These claims will accordingly be dismissed.

[4] 28 U.S.C. 2635(a).

of the inflatables is not amusement. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F.2d 1315 (1970).

The imported article is obviously intended to be utilized by a young child in the water. When inflated, the article is more square than round, and has a hole in the middle. The bottom is one piece with two leg holes that fashion the bottom into a sling-like seat. Other features include a so-called inflated backrest and an inflated handrail with two upright inflated supports all inflatedly integral. There are four variously colored rings that can be played with, that is, twirled or moved laterally on the inflated handrail. The bottom sling seat, backrest and handrail supports are a bright orange color. The top half of the inflated article is white with graphics of whimsical animals, faces, sun faces, flowers, etc. in orange, yellow, green and blue colors that obviously appeal to child-like fantasies. On the white part of the inflated article there is imprinted information that the article is an "Ideal" product "Made in Taiwan" and a warning "CAUTION Not a Life Saving Device Use With Parental Supervision." [5]

The imported article is sold deflated in a cardboard container [6] entitled "baby-me Play Float" that prominently depicts a picture of a mother with baby in a pool. The baby is seated in the inflated article floating on the water, the mother is standing in the water behind the baby with her hands on the backrest. Both mother and baby are smiling. The scene is obviously keyed to enjoyment.

On the front side of the container, alongside the mother and baby, is printed the following message:

> An inflatable baby seat that encourages baby to enjoy the water. Colorful foam filled vinyl rings add unlimited play. Useful head rest adds extra comfort. Safety valve out of baby's reach. This quality toy makes a perfect gift.

On the reverse side of the container are multicolored graphics of small children, pail and shovel, boat, sand, sun, bird, butterflies and flowers and a cautioning note that states:

> PLEASE NOTE:
>
> This Baby Seat provides a safe and confortable way for your baby to enjoy the water. As all responsible parents realize, a young child, unable to swim, cannot and *must* not be left entirely alone in the water. Most small children will not be able to climb out of this seat and most children will not be able to tip this. However, if they do start rocking it, and, particularly if this motion is aided by waves in the water, there is the possibility that it can be overturned. Therefore, be sure to continue your usual precautions in watching your child's activities. [Emphasis quoted.]

[5] Exhibit 1-A.
[6] Exhibit 1-B.

The record consists of the testimony from seven witnesses for plaintiff [7] and four witnesses for defendant.[8] There are ten exhibits for plaintiff [9] and seven exhibits for defendant [10] in evidence.

The transcribed record of the testimony runs approximately three hundred pages. For all that, except for nuances in the differing opinions on the question of whether the "Baby-Me Play Float" is a toy or not a toy, the testimony does nothing more than cumulatively corroborate the purpose of the play float as stated and depicted on the container in which it is sold. The container shows a mother attending baby seated in the inflatable float playing in the water. There is no dispute with the fact that the baby does not play with the float so much as it plays with the water—splashes, paddles the water with its feet and generally interacts with a parent or attending adult in biplay of sorts. None of the witnesses had observed a child more than two years or less than six months old seated in the play float, and there is at least tacit agreement that in water play both adult and child are amused. I find no evidence to the contrary.

Additionally, it is plaintiff's testimony that the play float was designed for preschoolers solely as a very functional water tender type seat; that the "Baby-Me" term is registered as a trademark with the

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[7] The following witnesses testified for plaintiff:
Miriam Gittleson - executive assistant and director of the import-export department of Ideal Toy Corp.
Anthony Landi - senior vice president of Ideal Toy Corp.
Edward Engel - physical education teacher, Board of Education, City of New York.
Stewart Sims - employed by Ideal Toy Corp.
Arnold Henning - import specialist, Customs Service, New York.
David Tito - import specialist, Customs Service, New York.
Miriam Graff - employed by Sunshine Contracting Corp., Passaic, New Jersey.

[8] The following witnesses testified for defendant:
Ascher Chase - executive vice president and general manager of General Foam Plastics Corp., doing business in flotation devices for swimming pools.
Sidney Silverman - vice president of sales for Coleco Industries, *inter alia* doing business in flotation devices for swimming pools.
Sam Cynamon - field representative for safety programs, American Red Cross in Greater New York.
Dr. Joseph Church - professor of child psychology, Brooklyn College, City University of New York. Exhibit F a resume of Dr. Church's work in the field of child psychology, received in evidence without objection.

[9] Plaintiff's exhibit 1-A is the imported article and exhibit 1-B is the container, *supra*.
Exhibits 2, 3, 4, 5 and 6 are photographs of a baby seated in the imported article floating in a pool, alone or with an adult, taken during a demonstration of how the article is used.
Exhibits 7, 8 and 9 are photographs, taken during the same demonstration, of an adult standing with baby seated in a flotation device in a pool. The baby is seated in the Ideal Toy Corp. "Baby-Me Love Bug Play Float" in exhibit 7, and the Ideal Toy Corp. "Baby-Me Tug Boat Play Float" in exhibits 8 and 9.
Exhibit 10 is a picture of an adult lying on a floating chaise lounge, at page 21 of defendant's exhibit D.

[10] Defendant's exhibit A is a photocopy of Ideal Toy Corp. registered trademark for "Baby-Me" inflatable floats, in class 22 for games, toys and sporting goods. 37 C.F.R. 6.2.
Exhibit B is restricted to pages 6, 16 and 17 of Ideal Toy Corp. 1972 catalogue depicting the imported inflatable article and various other inflatable articles for use in water recreation.
Exhibit C is a noninflatable flotation ring with a sling-like seat, sold by General Foam Plastics Corp.
Exhibit D is a General Foam Plastics Corp. 1975 catalogue, limited to page 22 depicting scenes of babies seated in devices like exhibit C, floating in the water under the eye of an adult.
Exhibit E consists of page 23 of the 1973 Coleco Industries catalogue, *inter alia* depicting a "Yogi Bear Head Ring" to keep "little dippers" heads up out of the water; a "Six Panel Ring" (i.e., six colored panels) flotation device, and a simulated canoe flotation device.
Exhibit F is a resume of Dr. Church's qualifications.

United States Patent Office in class 22 covering games, toys, and sporting goods;[11] that the play float is sold through toy stores or departments only because they get "greater traffic and, consequently, greater sales" than a baby store or department; that the term "toy," describing the play float was used merely as a "descriptive phrase" to convey a sense of enjoyment and recreation to the buyer; that the term "Play Float" is an all inclusive term conveying a sense of recreation, play ("Play is recreation. Play is enjoyment."); that the whimsical graphics on the play float are obviously geared to the fantasies of a child and that the colored rings were placed on the support bar to divert the child, and, at the same time, teach the child some color recognition.

On this record, the only question left open to the differing opinions of the witnesses is whether the "Baby-Me Play Float" is a toy. The opinion testimony addressed to that question is divided. I weigh the testimony to be about equal, that is, no stronger for plaintiff than for defendant. Plaintiff's witnesses opined that the purpose of the float was to support the baby and get the baby into the water; that the baby's amusement, alone or interacting with an attending adult, was induced by play with the water and not with the float as such. For that reason, they testified that the play float was not a toy. None of defendant's witnesses had observed a child seated in the imported play float in the water, but all had observed children at play in the water with similar types of articles. In sum, defendant's witnesses testified that the play float was a toy because it was the vehicle that enabled the baby to amuse itself in the water, alone or interacting with an adult who would also be amused.

Defendant contends that plaintiff has not overcome the presumption that, as classified, the play float is a toy. In support, defendant argues that plaintiff has failed to produce any evidence that the use of articles of the class or kind to which the play float belongs, to wit, water inflatables that are used and played with in the water, *cf. Davis Products, Inc., et al.* v. *United States*, 65 Cust. Ct. 367, C.D. 4105 (1970); *Same* v. *Same*, 60 Cust. Ct. 68, C.D. 3262, 279 F. Supp. 448 (1968), are not chiefly used for the amusement of children or adults.

Plaintiff's case ultimately rests on the argument that the purpose of the play float is chiefly utilitarian because the baby does not play with the float and, for all practical purposes, the play float does nothing more than it was designed to do, support the baby in the water.

I am not going to gainsay that a float that is designed to support a baby in the water does not serve some practical or utilitarian purpose. A baby is not old enough to appreciate the utility, but an attending adult is. It is a fact, however, that the play float also incorporates

[11] 37 C.F.R. 6.2.

features that have no utility and the play float is "obviously for a child." When amusement and utility become locked in controversy, the question becomes one of determining whether the amusement is incidental to the utilitarian purpose, or the utility purpose incidental to the amusement. *United States* v. *Globe Overseas Corporation*, 13 Ct. Cust. Appls. 10, T.D. 40849 (1925); *compare*, *H. Boker & Co. (Inc.)* v. *United States*, 19 Ct. Cust. Appls. 27, 29, T.D. 44870 (1931). Moreover, the utility of the inflatable article in this case and the amusement associated with it are not, in my opinion, mutually exclusive uses. On the record, I conclude that plaintiff has failed to overcome the presumption that the play float is chiefly used for the amusement of children or adults.

At the outset, plaintiff concedes that to be a toy, an article does not have to be a plaything, that is, it does not have to be played with, provided the quality or emotion induced by the article or use of the article takes on the character of frivolous amusement derived from an article which is essentially a plaything. *United States* v. *Topps Chewing Gum, Inc.*, 58 CCPA 157, 159, C.A.D. 1022, 440 F. 2d 1384 (1971); *Wilson's Customs Clearance, Inc.* v. *United States*, 59 Cust. Ct. 36, C.D. 3061 (1967) ("papier mache dogs" and "papier mache ware" for display or ornamentation held not dutiable as toys).

The merchandise in *Topps Chewing Gum, Inc.* consisted of objects variously labeled as "Wise Guy Buttons," "Smarty Buttons" and "Ugly Buttons." Each of the objects consisted of a round metal disk about two inches in diameter with a metal pin attached to the back. Humorous sayings and/or designs were printed in color on the front of the objects. Customs officials classified the objects as toys, not specially provided for. The Customs Court found that the objects were designed to be worn rather than played with; that the chief use was for wearing, and held that the objects were, accordingly, properly classifiable as buttons of metal. On appeal, the Court of Customs and Patent Appeals reversed the Customs Court stating:

> The court concluded from the evidence that the chief use of the imported objects was "wearing." We have no quarrel with that conclusion. Where we differ with the court below is in its reasoning that "wearing" and "amusement" are mutually exclusive. The court reached this result through an unduly narrow construction of the term "amusement." After noting that prior to the enactment of the TSUS a "toy" was defined as a child's plaything, the court cited *Wilson's Customs Clearance, Inc.* v. *United States*, 59 Cust. Ct. 36, C.D. 3061 (1967), for the proposition that the TSUS removed the limitation regarding the users' age but left the requirement that the object be a plaything. We think this conclusion is unsupported by the wording of the TSUS or by case authority. In the *Wilson's* case the court did not hold that to be a toy an object had to *be* a plaything,

> but that the "character of amusement involved was that derived from an item which is essentially a plaything." *Id.* at 39. The court thus stressed the quality of mind or emotion induced by the object as controlling, and we think that is the best approach to interpreting the TSUS definition. If the purpose of an object is to give the same kind of enjoyment as playthings give, its purpose is amusement, whether the object is to be manually manipulated, used in a game, or, as here, worn. We think the evidence is clear that the fun children derive from wearing the imported buttons is essentially the same kind of frivolous enjoyment they would derive from objects which we commonly think of as toys. Accordingly, we find that the importer failed to establish that the chief use of the imported buttons was other than amusement. The presumption of correctness of the Collector's classification was therefore not overcome. [58 CCPA at page 159.]

The record in this case establishes that the emotion induced in a child of six months to two years of age seated in the play float in the water is amusement. The child spashes the water, paddles its feet and responds to improvised play with an interacting parent or adult. The utility of the play float is that it does tend to support the child in the water. That support is not, however, unqualifiedly a safe support, because by "rocking it" there is "the possibility that it can be overturned." (Exhibit 1–B.) I have to believe that the utility of a play float, obviously for a child, bearing warning that it can be overturned by "rocking it" is suspect. Use of the play float by a child in the water, unattended by a parent or adult, is not recommended. It strikes me, therefore, that the prime motivation for a parent or an adult seating the child in the play float in the water is to amuse the child, and not the qualified utility of the play float, to safely support the child. As one witness testified, one essence of a child's enjoyment is movement, and the sensation of floating in the water would itself tend to amuse a child. The customs classification as a "toy" is also cumulatively buttressed by the evidence that the play float is obviously directed to a child's fantasies; that it is called a toy, trademarked as a toy (it is not a game or sporting equipment), and sold in toy departments at retail.

Plaintiff having failed to establish that the chief use of the imported play float was other than amusement, the presumption of correctness attaching to the classification by customs was not overcome, and these consolidated actions [12] are dismissed.

Judgment will enter accordingly.

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[12] Schedule A lists the court actions, protests and entries covered by the complaints in these consolidated actions.

Schedule B covers the disposition of protests identified in the summons commencing the consolidated actions which plaintiff failed to prosecute by complaint.

Schedule C, *inter alia*, reflects the disposition of affirmative defenses recited in defendants' answers to the complaints in the consolidated actions admitted by plaintiff.

All the schedules are attached to and made a part of the decision and judgment in these consolidated actions.

(C.D. 4689)

RUDOLPH MILES *v.* UNITED STATES

American goods returned

Z-beams, products of the United States, were processed in Mexico into floating sills and thereafter assembled into railroad cars classified under item 690.15 of the tariff schedules as railroad and railway rolling stock. Duty allowance for the Z-beams, claimed by plaintiff under item 807.00, as amended, *disallowed* for failing to qualify as articles "exported in condition ready for assembly without further fabrication" and as having not been "advanced in value or improved in condition abroad except by being assembled and except by operations such as cleaning, lubricating, and painting."

ITEM 807.00—FURTHER FABRICATION

The record testimony demonstrated that the steps performed on the Z-beams, until their incorporation into the undercarriages of the railroad cars, constituted "further fabrication" within the meaning of clause (a) of item 807.00, as amended. The burning of slots and holes in the Z-beams was an indispensable operation to their assembly as center sills into the railroad cars. The summary of testimony of the operations performed with respect to the Z-beams established the fact that the Z-beams were not "ready for assembly without further fabrication." See *General Instrument Corporation* v. *United States*, 60 CCPA 178, C.A.D. 1106, 480 F. 2d 1402 (1973) and *United States* v. *Texas Instruments Incorporated*, 64 CCPA 24, C.A.D. 1178 (1976) where a cutting process employed on products exported from the United States did not constitute "further fabrication" within the meaning of clause (a).

ITEM 807.00—PHYSICAL IDENTITY TEST

Physical changes in the article exported from the United States do not necessarily lead to loss of "physical identity" within the meaning of clause (b) of item 807.00. See *E. Dillingham, Inc.* v. *United States*, 60 CCPA 39, C.A.D. 1078, 470 F. 2d 629 (1972). "The legislative history makes it * * * apparent * * * that Congress did not intend to exclude articles from 807.00 merely because the American components had undergone some change of form or shape. The test specified * * * is whether the components have been changed in form, shape, or otherwise to such an extent that they have lost their *physical identity* in the assembled article." (Emphasis in original.) *United States* v. *Baylis Brothers Co.*, 59 CCPA 9, 12, C.A.D. 1026, 451 F. 2d 643 (1971).

ITEM 807.00—ADVANCED IN VALUE

The various operations performed with respect to the Z-beams increased their value and improved their condition. The burning of the slots and holes in the Z-beams was not an operation "incidental to the assembly process" of the Z-beams into railroad cars. The operations were not *ejusdem generis* with "cleaning, lubricating, and painting," or of a minor nature as contemplated by the legislative history of item 807.00, as amended. See H.R. Rep. No. 342, 89th Cong., 1st Sess. pp. 48–49 (1965).

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Court Nos. 73-11-03042, etc.

Port of El Paso

[Judgment for defendant.]

(Decided February 15, 1977)

Stein and Shostak (*S. Richard Shostak*) of counsel for the plaintiff.

Irving Jaffe, Acting Assistant Attorney General (*Herbert P. Larsen*, trial attorney), for the defendant.

RE, Judge: The question presented in these four actions, consolidated for purpose of trial, pertains to the lawful customs duties to be assessed on 200 roller bearing railroad boxcars with cushion underframes exported from Mexico and entered at the port of El Paso, Texas during 1970.

The boxcars were classified under item 690.15 of the Tariff Schedules of the United States [TSUS] which covers "Railroad and Railway rolling stock: Passenger, baggage, mail, freight and other cars, not self-propelled," with duty at the rate of 18 per centum ad valorem. Duty was assessed under item 807.00, TSUS, as amended by Public Laws 89-241 and 89-806, upon the full appraised value of the railroad cars less the cost or value of 56 fabricated components of United States origin.

Plaintiff does not dispute the classification, but challenges the refusal of the district director of customs to make an allowance of $395.22 per car in the appraisement under item 807.00 of the tariff schedules. The claimed allowance is for the cost or value of 400 Z-beams which were first processed in Mexico into floating center sills, and thereafter assembled into the imported railroad cars.[1]

Item 807.00 as amended by Public Laws 89-241 and 89-806 pursuant to which the allowance is claimed, provides:

> "Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the

[1] A list of 56 specialties and parts of American origin for which duty allowances were claimed and granted under item 807.00, TSUS, at the time of entry is attached to the Special Customs Invoice accompanying each entry. No claim was made for the "center sills," the 57th and last item on each list, until after liquidation upon the filing of a protest pursuant to section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514). Plaintiff's second amended complaint makes no reference to "Z-beams," but describes the items in controversy as "center sill sections, the product of the United States, which were assembled abroad into said railroad cars."

assembly process such as cleaning, lubricating, and painting	A duty upon the full value of the imported article, less the cost or value of such products of the United States (see headnote 3 of this subpart)"

Schedule 8, part 1, subpart B, headnote 3 reads:

"3. Articles assembled abroad with components produced in the United States.—The following provisions apply only to item 807.00:

(a) The value of the products of the United States assembled into the imported article shall be—

(i) the cost of such products at the time of the last purchase; or

(ii) if no charge is made, the value of such products at the time of the shipment for exportation,

as set out in the invoice and entry papers; except that, if the appraiser concludes that the amount so set out does not represent a reasonable cost or value, then the value of such products shall be determined in accordance with section 402 or 402a of this Act.

(b) The duty on the imported article shall be at the rate which would apply to the imported article itself, as an entirety without constructive separation of its components, in its condition as imported if it were not within the purview of this subpart. If the imported article is subject to a specific or compound rate of duty, the total duties shall be reduced in such proportion as the cost or value of such products of the United States bears to the full value of the imported article."

Plaintiff contends that the Z-beams meet every requirement of item 807.00, TSUS, and are thus entitled to the prescribed duty allowance.

Defendant disputes this claim, and maintains that plaintiff has failed to prove compliance with clauses (a), (b) and (c) of item 807.00, TSUS. It also contends that plaintiff has failed to establish the cost or value of the Z-beams as required by headnote 3 of schedule 8, part 1, subpart B, TSUS. Moreover, the defendant urges that, should plaintiff meet its burden of establishing entitlement to an allowance under the tariff item, its measure of recovery is limited to a deduction of the cost or value of only 221 of the 400 Z-beams from the value of the railroad cars. This contention is predicated upon plaintiff's failure to file, at the time of entry, export declarations (Customs Form 4467)

for the remaining 179 beams. The declaration is a necessary part of the documentation required by part 10 of the customs regulations to establish their status as products of the United States. It was stipulated at the trial that the 221 Z-beams, for which export declarations were filed and produced, were of American origin.

The first question is whether the record supports plaintiff's claim that the Z-beams were "assembled abroad" in compliance with the conditions set forth in clauses (a), (b) and (c) of item 807.00, TSUS.

Summary of Operations Performed Abroad.

The operations performed on the Z-beams in Mexico were described by one of plaintiff's witnesses, Mr. Arturo Sanchez, a mechanical engineer and technical manager of Constructora Nacional de Carros de Ferrocarril, S.A., which built the imported railroad cars. They were built for the Atchison, Topeka and Santa Fe Railroad in compliance with A.A.R. (Association of American Railroads) standards.

Mr. Sanchez testified that each of the imported railroad cars contains a floating center sill made up of two steel Z-beams, each 663½ inches long. He stated that in order to form the center sill, the Z-beams were first placed in pairs on a jig in a back-to-back position on the long side. After they were aligned, the center was located and the position of the seven stops where the shock absorbers would come in contact was determined. Seven steel stops were then electrically welded to each Z-beam. One stop was at the center, and three on each side which were equidistant from the center, and which lined up exactly with those on the other beam so that there would be no disalignment in the operation of the cars. In the next step, two slots were burned with an acetylene torch in the wide side, or "web," at each end of both Z-beams. This permits the insertion, at a later stage, of the draft key that fixes the coupler to the yoke, and is part of the system of gears that goes between each car. Each slot was then reinforced with a U-shaped steel strip that was welded around it.

The two Z-beams were then moved to a second jig and butt welded along their length. At this stage, the butt welded Z-beams became and were thereafter referred to as a floating, or sliding, center sill.

The center sill was removed from the jig, inverted, with the butt welded flanges facing downward, and placed upon special supports. In order to maintain the sill in its assemblage, eleven U-shaped guides were welded on each side of the center sill, and seven clamps, necessary to hold the brake pipe, were welded, six on one side and one on the other side of the sill. Since A.A.R. regulations require the brake pipe to cross the center sill, a slot was burned in the web of each Z-beam to allow the brake piping to pass through. Thick striker plates, or reinforcements, were then welded to the extreme end of each center sill to form a frame.

The next step involved the burning, with an acetylene blow torch, and reaming, where necessary, of 31 holes along the short flange, or wing, of each Z-beam. The purpose was to install on each beam four wear plates, to protect the center sill from damage, and seven support plates, to support the various devices and mechanisms, such as the hydraulic shock absorbers, draft gear system, and restorer spring which were to be placed inside the center sill. It was necessary to position the holes with a gauge so that the plates would be aligned and equidistant from the center of the sill.

In the next stage, the wear plates were affixed with bolts and rivets; the draft gear system, spring, yoke and other devices were placed within the floating center sill; the brake tubing was installed; and the support plates were attached with bolts and rivets or screws.

The completed center sill was then lifted and located on the underframe of the railroad car, which was also in an inverted position.

Clause (a).

Turning to clause (a) of item 807.00, the key question is whether the work performed upon the Z-beams in Mexico, from the time they were placed in pairs on the first jig until their assembly as complete floating center sills into the underframe of the imported railroad cars, shows that they were "fabricated components" exported "in condition ready for assembly without further fabrication." Solely for the purpose of deciding this issue, it is assumed that plaintiff has satisfactorily established the disputed American origin of the 179 beams for which no export declarations were produced.

Defendant, contending that the Z-beams were not "ready for assembly" as required by clause (a), in its brief urges that the burning of 3 slots and 31 holes in each beam was "part of the fabrication of the component" and that "whatever may have been exported [from the United States], it was not a fabricated component * * *." In essence, defendant contends that the Z-beams, which were first processed into center sills, are merely component materials, and that the center sills are the "fabricated components" which were assembled into the imported articles.

An article which is subjected to a subassembly process, or operation prior to assembly, is not necessarily precluded from qualifying for item 807.00, TSUS, status. In *General Instrument Corporation* v. *United States*, 60 CCPA 178, C.A.D. 1106, 480 F. 2d 1402 (1973), the appellate court specifically rejected, as being "unreasonably restrictive," what it termed "the artificial single assembly-dual assembly distinction as determinative of classification under item 807.00." *Id.* at 182. In the *General Instrument* case, the trial court, in denying the allowance under item 807.00, relied on the single or dual assembly theory espoused by the Customs Court in the case of *Amplifone Corp.* v. *United States*, 65 Cust. Ct. 58, C.D. 4054 (1970).

The *Amplifone* case interpreted the words "fabricated components * * * which * * * were exported in condition ready for assembly without further fabrication." It reasoned that item 807.00 required distinguishing between a single and a dual assembly process. In a *single* assembly process, the United States product is directly assembled or incorporated into the ultimate merchandise. In a *dual* assembly process, the article is first incorporated into a subassembly which, in turn, is assembled or incorporated into the ultimate merchandise. The *Amplifone* case held that for item 807.00 treatment, the "fabricated component" had to be a "complete" unit in itself, and not subject to further assembly other than directly into the final product to be exported.

By the application of the reasoning of the *Amplifone* case, the trial court, in the *General Instrument* case, held that, since the disputed articles were subject to a *dual* assembly process, they were not "fabricated components" within the meaning of item 807.00.

In reversing the decision of the trial court, and rejecting the rationale of the *Amplifone* case, the Court of Customs and Patent Appeals stated:

> "The inquiry under item 807.00 should not focus on the identification of possible sub-units of the whole product and the relationship between the disputed element and such sub-units. Instead, classification under item 807.00 depends upon the relationship of the disputed element to the whole. The steps to which the disputed element is subjected are, of course, relevant to the issue, but we do not agree that initial assemblage into an artificially identified sub-unit is a step which necessarily precludes a finding of mere assembly." 60 CCPA at 182.

Nevertheless, focusing the inquiry on the relationship of the Z-beams to the completed boxcars for export, and the steps performed on the Z-beams until their incorporation into the undercarriages, the court finds that the operations performed in Mexico, including the burning of slots and holes in the Z-beams, constituted "further fabrication" within the meaning of clause (a) of item 807.00, TSUS.

As the record amply demonstrates, the burning of slots and holes was an indispensable operation to the assembly of the Z-beams as center sills into the railroad cars. The record discloses that the slots were necessary for the insertion of the draft key which fixes the coupler to the yoke. They were likewise necessary to permit the brake piping to pass through the center sill as required by the A.A.R. regulations. The holes were essential for installation of the wear plates, which protect the center sill, and of the support plates, which keep the various devices in place inside the center sill. These operations show that the Z-beams were not "ready for assembly without further fabrication." The operations on the Z-beams are analogous to the opening, oiling and carding operations performed abroad prior to the

assembly upon the bulk fibers, in *E. Dillingham, Inc.* v. *United States*, 60 CCPA 39, C.A.D. 1078, 470 F. 2d 629 (1972). In the *Dillingham* case, the bulk fibers had been exported to Canada together with fabric to be made into papermakers' felt, and were returned to this country. The appellate court held that the opening, oiling and carding of the bulk fibers constituted "further fabrication" without which the fiber component was not in condition ready for assembly with the fabric under clause (a) of item 807.00, TSUS. In the case at bar, the burning of the slots and holes in the Z-beams constituted fabrication of a more advanced nature than the operations performed in the *Dillingham* case.

Also pertinent is *The Rubberset Company et al.* v. *United States*, 73 Cust. Ct. 107, C.D. 4560, 383 F. Supp. 1403 (1974). In the *Rubberset* case, nylon filaments of American origin were shipped in bulk to Canada. There they underwent various sorting and selection processes prior to their assembly into paint brush knots and paint brushes that were subsequently exported to the United States. The court held that this interim processing constituted a "further fabrication" within the meaning of clause (a) of item 807.00, TSUS.

Plaintiff cites the previously discussed case of *General Instrument Corporation* v. *United States*, 60 CCPA 178, C.A.D. 1106, 480 F. 2d 1402 (1973) as an example of an assembly process within the purview of clause (a). That case, however, is readily distinguishable from the case at bar. In the *General Instrument* case, anode foil, cathode foil, paper, metal tabs, plastic insulating film and cellophane tape were exported from the United States to Taiwan for assembly into electrolytic capacitors. All of these items, however, entered directly into the assembly process without any prior treatment other than cutting some of the components to length and trimming the edges of the anode foil. To the same effect, see *General Instrument Corporation* v. *United States*, 61 CCPA 86, C.A.D. 1128, 499 F. 2d 1318 (1974) (television deflection yokes) and *General Instrument Corporation* v. *United States*, 72 Cust. Ct. 86, C.D. 4507 (1974), *appeal dismissed*, 62 CCPA 109 (1974) (horizontal output transformers). In the case at bar, the operations pertaining to the burning of the slots and holes were essential prerequisites to the processing of the Z-beams into the center sills which were incorporated into the railroad cars. As shown in the recitation of the summary of testimony, these operations indicate that the Z-beams were not exported "in condition ready for assembly without further fabrication."

The operations performed on the Z-beams are also distinguishable from the cutting process employed in *United States* v. *Texas Instruments Incorporated*, 64 CCPA 24, C.A.D. 1178 (1976), in which completely fabricated and tested transistor chips were specially arranged by the thousands in rows and columns on silicon slices. They were

exported abroad for separation and assembly of the individual chips into operative transistors. Analogizing the cutting process to the operations performed on the wires or the foils in the *General Instrument* cases, *supra*, the court held that the cutting or separation of the chips did not constitute "further fabrication" within the meaning of clause (a) of item 807.00, TSUS.

Clause (b).

Although defendant states that the Z-beams were "changed in form and shape," the court agrees with plaintiff that, for purposes of item 807.00, TSUS, clause (b), they had not "lost their physical identity * * * by change in form, shape, or otherwise" upon their incorporation as center sills into the railroad cars. Neither the burning of holes and slots in the beams, nor the welding of two beams together into a center sill, resulted in a loss of their physical identity. That the Z-beams did not lose their physical identity may be seen in various photographs and diagrams submitted which illustrate, at different stages, the work performed on the beams.

Physical changes in the article do not necessarily lead to loss of "physical identity" within clause (b) of item 807.00. In the *Dillingham* case, *supra*, the appellee argued that the fabric component employed in making the exported article did not meet the requirements of clause (b) because its width was changed; it had been completely perforated with holes; and had become a blend of fabric and fibers. The appellate court disagreed:

> "The question, however, is not whether the fabric was 'changed' by assembly to form the article, but whether it has lost its 'physical identity in such articles by change in form, shape, or otherwise.' Neither the change in the width of the fabric nor its having been 'perforated with holes' is loss of physical identity. Further, an examination of the felts reveals that the fabric has not lost its physical identity by having the fibers entwined therein. Certainly the needled *assembly* acquired a 'new physical identity' as a papermaker's felt with a new 'commercial utility' but this does not necessarily mean that the *component* lost its physical identity. We find that it did not." (Emphasis in original.) 60 CCPA at 46.

Furthermore, as the Court of Customs and Patent Appeals stated in *United States* v. *Baylis Brothers Co.*, 59 CCPA 9, 12, C.A.D. 1026, 451 F. 2d 643 (1971):

> "The legislative history makes it equally apparent, however, that Congress did not intend to exclude articles from item 807.00 merely because the American components had undergone some change of form or shape. The test specified in item 807.00 is whether the components have been changed in form, shape, or otherwise to such an extent that they have lost their *physical identity* in the assembled article. The term 'physical identity'

was used to exclude from item 807.00 those assembled articles whose American components are 'chemical products, food ingredients, liquids, gases, powders,' and the like." (Footnote omitted; emphasis in original.)

This physical identity test was reiterated in two later cases: *General Instrument Corporation* v. *United States*, 60 CCPA 178, 183, C.A.D. 1106, 480 F. 2d 1402 (1973); *General Instrument Corporation* v. *United States*, 61 CCPA 86, 90, C.A.D. 1128, 499 F. 2d 1318 (1974).

Clause (c).

To qualify for the claimed item 807.00 allowance, subdivision (c) of that item requires that the articles "have not been advanced in value or improved in condition abroad except by being assembled and by operations incidental to the assembly process such as cleaning, lubricating, and painting." This requirement of clause (c) is not met since it is clear that the Z-beams were "advanced in value or improved in condition" by the various operations performed in Mexico.

Any doubt as to the meaning of clause (c) is resolved by the following statements in H.R. Rep. No. 342, 89th Cong., 1st Sess. pp. 48–49 (1965), accompanying H.R. 7969, subsequently enacted as the Tariff Schedules Technical Amendments Act of 1965, Pub. L. 89–241, which amended item 807.00, TSUS:

> "It appears that under the language of item 807.00 minor operations such as painting incidental to assembly abroad may be precluded, and that in certain respects the item is ambiguous, with the result that it imposes undue administrative burdens on customs officers.
>
> Section 72 of the bill would amend item 807.00 so that it would apply to articles assembled abroad in whole or in part of fabricated components, the product of the United States, which * * * (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.
>
> * * * * * * *
>
> The amended item 807.00 would specifically permit the U.S. component to be advanced or improved 'by operations incidental to the assembly process such as cleaning, lubricating, and painting.' It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. For example, in fitting the parts of a machine together, it may be necessary to remove rust; to remove grease, paint, or other preservative coatings; to file off or otherwise remove small amounts of excess material; to add lubricants; or to paint or apply other preservative coatings. It may also be necessary to test and adjust the components. Such operations, *if of a minor nature* incidental to the assembly process, whether done before, during, or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad." (Emphasis added.)

The burning of slots and holes in the Z-beams cannot be considered an operation "incidental to the assembly process" such as the removal of "small amounts of excess material." The operations performed here clearly are not *ejusdem generis* with "cleaning, lubricating, and painting," and, surely, are not of a "minor nature," as contemplated by the House Report.

Item 807.00, TSUS, was subsequently amended by Public Law 89–806. This amendment, however, merely removed the requirement of verifying that the American components were exported for the purpose of assembly and return as assembled articles to the United States. It was not designed to change the intended meaning of the earlier amendment as it pertained to clause (c).

Although made in the context of a different statute, the statements of the appellate court, in the incorporated case of *United States* v. *Jovita Perez*, 59 CCPA 190, C.A.D. 1065, 464 F. 2d 1043 (1972), are also pertinent. The *Perez* case dealt with Z-beams of United States origin that were made in Mexico into fixed center sills in somewhat similar manner to the fashioning of the beams of the present case into the floating center sills, and then incorporated into railway cars imported into the United States. Claim for free entry of the beams was made under the predecessor statute to item 807.00, TSUS, i.e., paragraph 1615(a), Tariff Act of 1930, as amended, which provided for:

> "Articles, the growth, produce, or manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means * * *."

In reversing the decision of the Customs Court, and holding that the beams had been advanced in value and improved in condition, the Court of Customs and Patent Appeals stated:

> "In the present case, the burning of the slots and the numerous holes in the 613 inch Z beams, the introduction of the camber followed by continuous welding of the pairs of beams together and the many other steps in the process were steps toward incorporating the Z beams in a boxcar in accordance with their intended purpose. The only reasonable inference from the facts is that the beams were advanced in value and improved in condition. That view is reinforced by the presumption that the original determination of the customs officials in denying free entry was correct and involved findings of all facts necessary to support that determination. See *Howland* v. *United States*, 53 CCPA 62, C.A.D. 878 (1966)." 59 CCPA at 195.

The appellate court indicated that the burden was on the importer to show "as a matter of fact, that there has been no advance in value or improvement in condition in the article for which he seeks free

duty." *Ibid.* Since the court held that the burden "clearly" had not been met, it reversed the judgment of the trial court.

Notwithstanding the difference between a floating sill and a fixed or stationary sill, and the pertinent statutes, the statements of the court in the *Perez* case are equally applicable here.

In order to prevail, it was incumbent upon plaintiff in this action to prove that the beams "were exported in condition ready for assembly without further fabrication." It was also necessary to establish that they had "not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting."

The testimony of plaintiff's witnesses reveals clearly the numerous steps or processes to which the Z-beams were subjected in Mexico. From the testimony, the inferences are inescapable that they were not ready for assembly without further fabrication, and that they had been advanced in value or improved in condition abroad.

On the evidence of record, the court finds that plaintiff has failed to establish compliance with clauses (a) and (c) of item 807.00, TSUS. Hence, it is the determination of the court that plaintiff is not entitled to the duty allowance provided for in item 807.00 of the tariff schedules.

In view of this holding, it is unnecessary to reach the other questions raised.

Judgment will be entered accordingly.

(C.D. 4690)

S & T IMPORTS, INC. *v.* UNITED STATES

Candied pineapple—Preserved pineapple

Imported pineapple containing between 72.4% and 74% of soluble sugar solids and produced by the so-called slow-impregnation process held properly classified by the government under item 154.45 of the tariff schedules as candied pineapple rather than under item 148.98 as preserved pineapple, as claimed by plaintiff.

Court No. 72-12-02631

Port of Laredo

[Judgment for defendant.]

(Decided March 18, 1977)

Stein and Shostak (*S. Richard Shostak* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Steven P. Florsheim*, trial attorney), for the defendant.

MALETZ, Judge: The importations involved in this action consist of merchandise invoiced as "Drained preserved pineapple" which was

exported from Mexico and entered at the port of Laredo, Texas in September 1971. The merchandise was classified by the government as candied, crystallized, or glace fruits under item 154.45 of the Tariff Schedules of the United States (TSUS), as modified by T.D. 68–9 and assessed duty at the rate of 10% ad valorem.[1] Plaintiff challenges this classification and claims the imported merchandise is properly classifiable as prepared or preserved pineapple under item 148.98, as modified, dutiable at the rate of 0.75¢ per pound.

The provisions of TSUS pertinent to the classification and claim are as follows:

Classified under:

Schedule 1, Part 9, Subpart D:

	Candied, crystallized, or glacé nuts, fruits, fruit peel, and other vegetable substances:	
	* * * * * * *	
154.45	Pineapples	10% ad val.

Claimed under:

Schedule 1, Part 9, Subpart B:

Subpart B headnotes:

1. For the purposes of this part—

* * * * * * *

(e) the term "prepared or preserved" covers fruit which is dried, in brine, pickled, frozen, or otherwise prepared or preserved, but does not cover fruit juices * * * or candied, crystallized, or glacé fruits (see subpart D of this part). [Emphasis added in part.]

* * * * * * *

	Pineapples, fresh, or prepared or preserved:	
	* * * * * * *	
148.98	Prepared or preserved	0.75¢ per lb.

Plaintiff claims the government's classification is erroneous contending that the importations are not candied, crystallized or glace fruit within the meaning of the statute. According to the plaintiff, in its condition as imported the merchandise in issue has neither the characteristics nor the uses of candied, crystallized or glace fruit and is not recognized in the trade and commerce of the United States as candied, crystallized or glace fruit. Thus, plaintiff insists that the imported merchandise should be classified under the provision for

[1] An additional surcharge of 10% was assessed on the imported merchandise under item 948.00 which plaintiff has not contested.

preserved pineapple. In addition, plaintiff states that the correctness of its claim is confirmed by the alleged fact that from at least 1948 until 1971 the merchandise was uniformly classified by the government as preserved pineapple at the seven United States ports of entry at which it was entered.

In this context, the issue in the case is whether the imported merchandise was correctly classified under item 154.45 as candied, crystallized or glace pineapple or is properly classifiable under item 148.98 as prepared or preserved pineapple, as claimed by plaintiff.

In an effort to substantiate its claim, plaintiff called five witnesses [2] and introduced eight exhibits. Defendant, for its part, called two witnesses [3] and introduced seven exhibits. In addition, the parties stipulated that the total sugar solids in the subject merchandise, in its imported condition, was between 72.4% and 74.0% by weight and that the total soluble solids content of the subject merchandise, in its imported condition, was approximately 75° brix.[4]

Against this background, we consider first the manner in which the imported pineapple is processed in Mexico. Initially the pineapple is immersed in a brine which contains sulphur dioxide as a preservative against micro-organisms and calcium carbonate to strengthen the fiber of the pineapple. The pineapple remains in the brine for periods up to a maximum of seven months while awaiting processing, during which time there is a leaching out of some of the natural sugar. When the pineapple is taken out of the brine, it is boiled to reduce the sulphur content and to tenderize the fruit so it is capable of absorbing syrup. It is then placed in a 30° brix solution (syrup) where by osmosis the liquid in the fruit comes out and is replaced by the syrup. The fruit is then subjected to further boiling and slow impregnation with syrups of sugar concentrations increased by 4° brix a day during which time heat is intermittently applied. This is continued until the pineapple and surrounding syrup reach a density or equilibrium state of about 75° brix. The sugar used in the

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[2] Plaintiff's witnesses were Edward C. Twyford, Jr., the president of S.T.I. Industries (successor to the plaintiff company) and general manager of International Fruit Products Co., a large producer of preserved pineapple in the United States; Ralph Lagueruela, the production manager of Procesadora S.A., the Mexican manufacturer of the imported pineapple; Robert I. Unger, an associate of International Fruit Products Co.; Melvin S. Gordon, the president of the Paradise Fruit Co. in Florida, a company which preserves and imports pineapple; and Harry Dennery, the marketing director of Charles Dennery Co., New Orleans, La., a company which had been supplying the baking and ice cream industries with ingredients for more than 81 years.

[3] Defendant's witnesses were Hilton D. Hotchkiss, the president and general manager of Edenfruit Products Co. which processes pineapple in the United States; and Dr. Martin W. Miller, a professor of food science and technology at the University of California at Davis.

[4] The sugar concentration of sugar-impregnated fruit is generally measured and expressed as a brix value (°brix). More accurately, the brix value is an approximation of the percentage of total soluble solids in the product. Since practically all of the soluble solids in a sugar-impregnated fruit are sugars, the brix value, i.e., the percentage of total soluble solids, and the percentage of total sugar solids for a given product are considered roughly equal in commerce.

syrup is an invert sugar which is used to prevent recrystallization.[5] Citric acid is added to retard spoilage, while sodium benzoate is added as a preservative. Thus, after processing, the imported merchandise contains fruit, water, sugar, citric acid, sodium benzoate and in some cases food coloring. The processed pineapple is then packed in drums and shipped, or drained of excess syrups and packaged in boxes for shipment.

The record shows that candied fruit (including pineapple) is fruit which has been manufactured through the slow-impregnation or candying process, described above, and which has a sufficient sugar concentration to prevent spoilage.[6] Glace (or glazed) fruit (including pineapple) is candied fruit which has been subjected to an additional manufacturing process whereby a thin sugar glaze is applied to the surface of the fruit.[7] Crystallized fruit (including pineapple) is candied fruit which has been subjected to additional manufacturing process whereby a crystalline sugar coating is applied to the surface of the fruit.

Plaintiff's witnesses testified that "candied pineapple" has a 78° to 82° brix value which, they stated, is the minimum sugar concentration necessary to prevent spoilage. Other testimony on behalf of plaintiff indicated that for the past 25 years merchandise such as the importations has been commercially known, bought, and sold only as drained, preserved pineapple, and is not bought or sold in the trade and commerce of the United States as candied pineapple. According to the witnesses for plaintiff, the imported pineapple did not meet the specifications for candied pineapple, nor was it used for the same purposes as candied fruit. Continuing, plaintiff's witnesses testified that the imports were primarily used in making fruit cake and for this purpose were sold directly to bakers and also repackaged for retail sale to housewives; they added that another use of the imported product was for further manufacture into candied, glace or crystallized pineapple. They stated that by contrast candied pineapple was sold to confectionery manufacturers such as Whitman's, Schrafft's and Russell Stover.

Defendant's witnesses testified, on the other hand, that the importations were candied pineapple because they were made by the slow-impregnation or "candying" process and the sugar solids content of 72.4% to 74.0% and the approximate 75° brix value would preserve the imported product against spoilage under proper storage and handling conditions. However, they stated that because companies cannot

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[5] After sucrose or cane sugar reaches a 67° brix, it is no longer stable and it is necessary to add either glucose or an invert consisting of dextrose and levulose (sugars) in order to prevent the recrystallization of the sugar. These invert sugars have the ability to mix with the sucrose and to have a solubility that will reach 77% or 78% without recrystallization.

[6] See Cruess, *Commercial Fruit and Vegetable Products* (4th ed. 1958) p. 480.

[7] *Id.* at 480–481.

insure adequate storage and handling once the product is shipped, it is an industry-wide practice to add a preservative such as benzoate of soda.[8]

Defendant's witnesses further testified that it was a general industry practice to call products such as the importations preserved or drained pineapple. In this connection, they left no doubt that the importations were preserved and drained; however, they insisted that the term drained referred to a species of a broader category of pineapple which was candied pineapple. The term candied, they testified, like the term glace, was used as a generic term in the industry to refer to fruit prepared by a slow-impregnation process where the general result was a product with the general appearance of the fruit but the tissues of which were fully impregnated with sugar to a specified level.[9]

With these facts in mind, we turn now to the legal aspects. Tariff laws are written in the language of commerce and the commercial meaning of a term is presumed to be the same as its common meaning in the absence of a contrary legislative intent or proof of a commercial designation that differs from the ordinary understanding of the term. See Sturm, *A Manual of Customs Law* (1974) pp. 202 et seq. In determining the common meaning of a term, the court may rely on its own understanding of the terminology, works of standard lexicographers, scientific authorities, the testimony of witnesses, or such other sources as may be available. E.g., *United States* v. *National Carloading Corp. et al.*, 48 CCPA 70, 71–72, C.A.D. 767 (1961); *United States* v. *John B. Stetson Co.*, 21 CCPA 3, 9, T.D. 46319 (1933).

The controversy before us involves the meaning of the term "candied" as used in the provision of the tariff schedules under consideration. In essence, plaintiff argues that the term "candied pineapple" in the trade and commerce of the United States covers only products having at least 78° to 80° brix which are primarily used by candymakers and confectioners. Defendant, on the other hand, contends that the imported merchandise is "candied pineapple" since it was manufactured by the slow-impregnation or "candying" process and since the sugar concentration is sufficient to prevent spoilage.

In resolving this controversy, we are reminded that the master rule of construction of tariff acts, as of other statutes, is to interpret them so as to carry out the legislative intent. See Sturm, *op. cit.*, *supra*, p. 156. In other words, the basic rule of construction of a statute is that the intent of Congress is to be given effect and all other rules of construction must yield if the legislative intent is shown

[8] Edenfruit Products Co. has sold, without adding a preservative, candied pineapple which had a brix value of 75° plus or minus 1.

[9] To similar effect, plaintiff's own witnesses Twyford and Dennery testified that in the industry merchandise such as the importations is in the generic sense generally referred to as "glace pineapple."

to be counter to this intent. *American Rusch Corp.* v. *United States*, 74 Cust. Ct. 153, 159, C.D. 4599, 394 F. Supp. 1402, 1405 (1975).

Highly relevant in determining what Congress intended by the use of the term "candied" is the United States Tariff Commission's *Report to the President, Candied, Crystallized or Glacé Fruits*, Report No. 74, Second Series, 1934, in which the following appeared at p. 3:

> *Description and uses*
>
> Candied, crystallized, or glacé fruits are manufactured from practically all fruits. The principal varieties are cherries, pineapples, apricots, figs, dates, pears, peaches, plums, prunelles, and green gages. Candied or glacé fruits may be generally described as confections and are used mainly as confectionery. They also have some use in cakes and ice creams.
>
> The processes of manufacturing are much the same in the United States and other countries. The raw fruit is usually sulphured to bleach its color, and in the case of fruits such as cherries and apricots the pits are removed. The fruits are then *placed in brine to remove as much of the natural sugars as possible;* thereafter they are thoroughly washed to remove the brine solution and the excess of the sulphur dioxide present. They are then placed in sirups of increasing density with intermittent cookings. The siruping process is time-consuming as for many fruits 10 or 12 different operations are necessary before the highest density of sirup is employed. *The object is to replace the natural juices of the fruit with a highly concentrated sirup solution usually containing about 70 percent of sugar.* It is customary to use a mixture of cane or beet sugar sirup and corn sirup or glucose. After the fruit is saturated with sugar it is allowed to drain and if desired, to crystallize. * * * [Emphasis added.]

From the foregoing it appears that candied or glace fruits are those which have been produced by the slow-impregnation process to a point where they contain about 70% sugar solids.

To the same effect is the following language in the *Summaries of Trade and Tariff Information* (1969), Schedule 1, Vol. 8, p. 275:

> *The term "candied" means a product which has been impregnated with sugar, usually to such a degree that 70 percent or more of the weight is sugar.* "Crystallized" refers to sugar crystals formed on the surface of the product resulting in a rough crystalline appearance. "Glace" refers to a coating of sugar sirup on the surface of the product resulting in a smooth, shiny appearance. Products may be crystallized or glaced whether or not they are candied. In this summary the three forms are collectively referred to as candied. [Emphasis added.][10]

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[10] While the 1969 *Summaries* obviously are not legislative history of the TSUS, they have been used by the courts as an aid in determining the scope of tariff provisions. E.g., *Prestigeline (Div. of Weiman Co., Inc.)* v. *United States*, 75 Cust. Ct. 139, 148, n. 5, C.D. 4618, 406 F. Supp. 532, 539 (1975). Specifically, the *Summaries* are useful as an aid in the determination of the *common meaning* of terms utilized in the TSUS. *Durst Industries, Inc.* v. *United States*, 73 Cust. Ct. 160, 165-166, C.D. 4568 (1974).

In the *Summaries of Tariff Information* (1948), Vol. 7, part 4, p. 143, there is set forth, as follows, not only the formula for candied pineapple but also the reason why the tariff rate on candied pineapple is higher than the rate on the preserved product:

PINEAPPLE, CANDIED
(PAR. 747)

Comment

In the United States, candied pineapple is manufactured principally for use by bakers in fruitcake mixtures, but it is also widely used as a confection.

* * * * * * *

As illustrated below, the tariff rate on imports of candied pineapple, and the rates on pineapple in brine (the raw material) and on refined sugar, are favorable to the production of the finished product in the United States.

In 1943, for example, the average foreign value of imports of candied pineapple was 14.6 cents per pound; of pineapple in brine, 12.7 cents; and of refined sugar, approximately 3.5 cents per pound. *To produce 100 pounds of candied pineapple requires 100 pounds of pineapple in brine and 70 pounds of refined sugar.* Computed at the average foreign unit value of each of these products as imported separately, the pineapple in 100 pounds of candied pineapple represents a value of approximately $12.70, and the sugar, $2.45. [Emphasis added.]

The calculated duty on 100 pounds of candied pineapple from Cuba in 1943 was $2.04 (14 percent of $14.60), but if the two ingredients had been imported separately the duty would have been $1.36 (100 pounds of pineapple in brine from Cuba at 0.8 cent per pound and 70 pounds of Cuban sugar at 0.795 cent per pound), or an advantage of 0.68 cent a pound. However, this advantage was probably offset to a considerable extent by factors, such as the freight on the pineapple in brine and by the higher duty paid price of the refined sugar in the United States.

Under the Geneva agreement the rates of duty on Cuban sugar and on pineapple in brine were reduced approximately by one-third but the rate on candied pineapple was bound at the existing level; consequently, the tariff advantage in favor of producing the finished article in the United States has been somewhat increased.

In addition, the following from the 1948 *Summaries*, *id.* at p. 145, makes it clear that the term "prepared or preserved" was not intended to cover pineapple which had been produced by the slow impregnation process but was intended to cover *canned pineapple in syrup or pineapple shipped in brine or water:*

PINEAPPLES PREPARED OR PRESERVED, EXCEPT CANDIED, CRYSTALLIZED OR GLACE
(PAR. 747)

* * * * * * *

245-925 O - 78 - 7

Comment

The prepared or preserved pineapples covered by this summary are mostly pineapples canned in sirup (sliced, chunks, or crushed) but also small quantities in brine or water for the use of manufacturers of candied or glace pineapples.[1] * * *

[1] This summary does not cover candied, crystallized or glace pineapples (see separate summary (par. 747)), nor pineapple juice (see separate summary, par. 806(a)).

From all of the foregoing, we find a clear manifestation of a specific Congressional intent that pineapple such as that here in issue which is produced by the slow-impregnation process and contains over 70% sugar solids constitutes "candied" pineapple for the purposes of the tariff schedules.

In an effort to counter these clear indicia of legislative intent, plaintiff puts forth the following argument (plaintiff's brief, p. 24):

> In the *1948 Summaries of Tariff Information*, Vol. 7, Part 5 at page 143, it is indicated with reference to the candied pineapple included within Paragraph 747 of the Tariff Act of 1930 (the predecessor of Item 154.45 of the Tariff Schedules) that to make 100 pounds of candied pineapple, 100 pounds of pineapple in brine and 70 pounds of refined sugar are required. As established by plaintiff's witnesses, because of the natural sugar content of pineapple of 7% to 17%, this mixture would result in at least 77% to 79% sugar solids content (R. 91–93, 150–152). [In *Elements of Food Engineering*, (1952) by Milton E. Parker, Director and Professor, Food Engineering Illinois Institute of Technology, it is recognized that the nonpotable juice of the pineapple contains about 9% of sugar (Vol. 1 at page 224)]. Such product, unlike the merchandise at issue herein, would concededly be candied pineapple.

This contention, however, is without merit for a careful reading of the record indicates that plaintiff's witnesses did *not* testify that the formula in the 1948 *Summaries* would result in a product with a 77% to 79% sugar solids content. Thus, plaintiff's witness Twyford testified that the normal natural sugar content in the imported pineapple runs about 7% to 9% and if *"no mechanical loss were present"* the resultant pineapple would have a 77% to 79% sugar solids content. (R. 93, emphasis added.) However, Mr. Twyford further indicated that *there is mechanical loss* in the manufacture of the imported product and for that reason he *could not* determine the percentage of total sugar when using 70 pounds of sugar to 100 pounds of pineapple in brine (R. 91–93). Further, the testimony of plaintiff's witness Lagueruela was carefully limited to a situation where there was "no mechanical loss" of natural sugar (R. 150–152). He, too, could not answer as to the amount of sugar solids present in a product made by the foregoing formula (*ibid.*).

The fact is that in the processing of the imported pineapples here in issue by the slow-impregnation process there is a very substantial

mechanical loss of natural sugar. Pertinent in this regard is the Tariff Commission's 1934 *Report to the President, supra*, p. 3, which pointed out that as one of the first steps in "candying" "[t]he fruits are * * * placed in brine to remove as much of the natural sugars as possible." Plaintiff's witness also testified to the fact that there is a leaching out of the soluble natural sugars from the pineapple during its processing (R. 157).

In these circumstances, we reject the argument that the legislative history indicates that "candied fruits" require over 78° brix.

Important, too, is the additional consideration that we have failed to find any authority—nor has plaintiff brought any to our attention—which would indicate that a particular brix or solid sugar percentage is necessary for a product to be a "candied" one. To the contrary, every authoritative source that the court has found through its research defined candied fruit only in terms of *how* the product is manufactured. Thus, the *Encyclopaedia Britannica* (1970), Vol. 9, p. 551, states:

> Candied fruits are made by cooking whole fruits or fairly large pieces of fruit in sirup until the fruit is clear and plump. To avoid shrinking the fruit the sugar concentration must be increased gradually. If the fruit is put directly into a heavy sirup, the water in the fruit will be drawn out because of the difference in concentration of the solutions inside and outside the fruit and the fruit cells will collapse, shriveling and toughening the pieces. Finally, the pieces are drained from the thick sirup and dried slowly until no longer sticky.

Cruess, *Commercial Fruit and Vegetable Products, supra* (hereafter referred to as "Cruess"), has the following to say (pp. 480–481):

> The candying process consists essentially of slowly impregnating the fruit with sirup until the sugar concentration in the fruit is high enough to prevent spoiling. The process must be so conducted that the fruit does not soften and become jam or become tough and shriveled. Repeated boiling and storage in sirups of progressively increasing sugar concentration will accomplish the desired results.
>
> Following impregnation, the fruit is washed and dried. It may be packed and sold in this form, or it may be coated with a thin glaze of sugar and glucose sirup—*glacéd*. This is done by dipping the dried candied fruit in a sirup and again drying the surface.

In Desrosier, *The Technology of Food Preservation* (1959) (hereafter referred to as "Desrosier"), the chapter entitled *Preservation of Food as Sugar Concentrates* contains the following with respect to candied and glaced fruits (p. 290):

> Candied and Glacéd Fruits
>
> The *candying of fruits essentially involves their slow impregnation with syrup until the sugar concentration in the tissue is*

sufficiently high that it prevents the growth of spoilage microorganisms. The candying process is conducted in such a manner that the fruit does not soften and become merely jam, or becomes tough and leathery. By treating fruits with syrups with progressively increasing sugar concentrations, desired results may be obtained. The reader is referred to the publications of Cruess and coworkers for detailed information on candied fruits. Following the impregnation of the fruit with sugar, the fruit is washed and dried. The candied fruit, as it is now called, may be packaged and marketed in this condition, or the fruit may be coated with a thin glazing of sugar. In this case, candied fruits are dipped into syrup and again dried. The sugar coated candied fruit is called glacéd fruit. [Emphasis added.]

In McGraw-Hill, *Encyclopedia of Science and Technology*, Vol. 5 (1966), the following is stated (p. 409):

Glacéd fruit. Fruit may be preserved by allowing its slow impregnation with syrup of increasing sugar concentration, developing such osmotic pressures within the tissues that microbial attack is prevented. This candied fruit is then washed, dried, and packaged. Candied fruit may be given a dip into syrup and again dried to develop a thin glaze of sugar coating; this product is called glacéd fruit. [Norman W. Desrosier.]

From the above, it is evident, as stated previously, that candied fruit is fruit which has been manufactured through the slow-impregnation process and which has a sufficient sugar concentration to prevent spoilage.

Plaintiff's witnesses testified, however, that candied fruit does not reach the stage where the sugar solids are sufficient to prevent spoilage until the percentage of such solids reaches 78° to 82° brix (R. 94–95, 196). On the other hand, the witnesses for defendant testified that a 75° brix value would be sufficient to prevent spoilage (R. 285).[11] In face of these conflicting contentions, it is significant that the authorities are in total agreement with the witnesses for defendant. For example, Desrosier, in discussing the *Preservation of Food as Sugar Concentrates*, states (p. 282):

Concentrated but Moist

A food substrate concentrated to 65 or more per cent soluble solids which contains substantial acid may be preserved with mild heat treatments provided it is protected from air. With more than 70 per cent solids, high acid content is not required.

Desrosier also discusses various foods and fruits preserved by sugar concentrates. From this discussion, it appears that such foods and fruits with a concentration of 70% sugar solids (and in some cases less) are preserved to the point where microbial spoilage cannot occur even without hermetic sealing. See Desrosier, pp. 282–284, 292.

[11] In this vein, a witness testifying in *Edenfruit Products Co.* v. *United States*, 10 Cust. Ct. 134, 135, C.D. 737 (1943), which dealt with brined pineapple cores, described how these cores were *candied* by being impregnated with sugar solution to approximately 72% solid sugar.

According to Cruess, the "candying process consists essentially of slowly impregnating the fruit with sirup until the sugar concentration in the fruit is high enough to prevent spoiling" (p. 480). As a corollary, Cruess specifies the concentrations in the various methods of impregnation he describes under the slow process. Under this process, a fruit is fully impregnated when the syrup has reached about 72° Balling (p. 482).[12]

Plaintiff also contends in its brief (p. 22) that "[a]ll the methods of manufacturing candied fruit described by Cruess require drying of the processed fruit, and after drying all methods result in a product in excess of 78° Brix (R. 87, 150.)"[13] Thus, plaintiff argues that the processed fruit is not free from spoilage until after drying and, therefore, not candied until after drying. While it is true that every description of the candying process includes the steps of washing and drying, this does not lead to the conclusion that the fruit is not candied until such drying takes place. In the first place, there is no evidence which correlates the drying process to specific brix values. Furthermore, as we have seen, the record establishes that processed fruit with a 75° brix is free from microbial spoilage. As previously noted, Cruess states (p. 480) that the "candying process consists essentially of slowly impregnating the fruit with sirup until the sugar concentration in the fruit is high enough to prevent spoiling." This meaning is clear and has nothing to do with the drying of the fruit once it is candied. In fact, it has been shown by the testimony that the purpose of drying the fruit is to overcome stickiness. Cruess not only agrees but also makes clear that the candying process is completed before the drying process begins. Thus, he states (p. 466):

> *Candied Fruits.* Candied fruits are prepared by gradually concentrating fruits in sirup by repeated boilings until the fruit is heavily impregnated with sugar, *this process being followed by drying to overcome stickiness.* [Emphasis added.]

In sum, we cannot agree with plaintiff's contention that candied fruits require at least 78° to 80° brix values and that the imported pineapple is not candied.

The function or use of the importation is also relevant to the question of the common meaning of a given term. *J. E. Bernard & Co., Inc.* v. *United States*, 66 Cust. Ct. 362, C.D. 4215 (1971). Thus, the questions arise as to what the use or function of candied pineapple is, and how that use or function compares to that of the imported pineapple. While plaintiff's witnesses described the use of candied fruit as being limited to candy manufacture or use as a confectionery, the legislative history and the weight of the evidence are persuasive that candied fruit is used: (1) as an ingredient in fruitcake; (2) as a confectionery;

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[12] Degrees brix and degrees Balling are equivalent. See R. 90-91; Cruess, p. 79.

[13] The above record citations referred to in plaintiff's brief do not support this contention.

(3) as an ingredient in candy; and (4) for further manufacture into glace or crystallized fruit. See, e.g., *Summaries of Tariff Information* (1948), *supra*, p. 143; *Summaries of Trade and Tariff Information* (1969), *supra*, pp. 275–276; *Edenfruit Products Co.* v. *United States*, *supra*, 10 Cust. Ct. at 135; the Military Services Specification for fruitcake ingredients, including candied pineapple (defendant's exhibit G); and A & P National Bakery Division Specifications (defendant's exhibit E). See also R. 249–250, 258–259. As we have seen, the record establishes that the importations are primarily used in baking for fruitcakes and for making higher concentrated glace and crystallized fruit. Such uses are identical to those described by the authorities for candied fruit.

Turning now to another area, the testimony of plaintiff's witnesses established that the importations were referred to as "preserved," "drained" or "drained preserved pineapple." While the terminology utilized to describe a certain product has a definite bearing on what it is, it is not the *sine qua non* for classification. *W & J Sloane, Inc.* v. *United States*, 76 Cust. Ct. 62, C.D. 4636, 408 F. Supp. 1392 (1976); *J. E. Bernard* v. *United States*, *supra*, 66 Cust. Ct. at 367. Thus, even if the importation was exclusively referred to as drained pineapple, it would not be removed from classification under the common meaning of the term candied pineapple.

In any event, the record demonstrates that the importations were not exclusively referred to as "drained," "preserved" or "drained preserved pineapple." In this connection, two of plaintiff's witnesses testified that merchandise materially similar to the importation is referred to as "glace pineapple." See note 9, *supra*. Further, the evidence adduced by defendant showed that in the glace fruit industry the terms "glace," "drained," "preserved" and "candied" are interchangeable when used to describe products such as the imported pineapples. See R. 250–257; defendant's exhibits E, F and G. As further indication of the interchangeability of terms, Cruess refers to glace fruit being manufactured from *candied* fruit (pp. 480–481, 484), whereas a witness for plaintiff testified that glace fruit was manufactured from *drained* fruit (R. 131–133). Similarly, in *Christo Poulos & Co., Inc., et al.* v. *United States*, 35 Cust. Ct. 69, C.D. 1724 (1955), which involved the proper classification of imported preserved cargo ginger in brine, the court referred to the product made from the imported ginger both as "candied ginger" (35 Cust. Ct. at 71, paragraph 2) and "drained ginger" (35 Cust. Ct. at 72, line 2). Additionally, it is noted that in Cruess the terminology "drained candied fruit" is used (p. 484). All this impels the conclusion that the terms "candied" and "drained" are used synonymously in segments of the industry and further that the use of the term "drained" does not preclude the merchandise from being candied or glaced pineapple.

We also find without merit plaintiff's claim that the term "candied pineapple" is a commercial designation which in the trade and commerce of the United States generally, definitely and uniformly is limited to pineapple having at least 78° to 80° brix and which is used by candymakers, confectioners and fancy fruit packers. Commercial designation refers to a situation where it is affirmatively established that a tariff term, at the time it was enacted into law, had a meaning in the trade and commerce of the United States which differed from the common meaning and which was fully and completely understood and accepted throughout the United States by *all* those dealing at wholesale in that class of goods. *United States* v. *Wells, Fargo & Co.*, 1 Ct. Cust. Appls. 158, 161–162, T.D. 31211 (1911); *Florsheim Shoe Company et al.* v. *United States*, 71 Cust. Ct. 187, 190–191, C.D. 4495 (1973).

In *Jas. Akeroyd & Co. et al.* v. *United States*, 15 Ct. Cust. Appls. 440, 443, T.D. 42641 (1928), the court pointed out the limitations of the commercial designation rule, as follows:

> Commercial designation is a thing often claimed in customs litigation and rarely established. The rule of commercial designation was never intended, as has been often said, to apply to cases where some portion of the trade use a certain trade practice or nomenclature, but was intended to apply to cases where the trade designation is so universal and well understood that the Congress, and *all* the trade, are supposed to have been fully acquainted with the practice at the time the law was enacted. There was never any other reason for the rule. [Emphasis added.]

A recent pronouncement of the law regarding the commercial designation principle was set forth in 1973 in *Florsheim Shoe Company et al.* v. *United States*, *supra*, 71 Cust. Ct. at 190–191, as follows:

> Where, however, it is affirmatively established that a tariff term at the time it was enacted into law, had a meaning in the trade and commerce of the United States which differed from the common meaning and was uniform, definite and general, such meaning will be adopted, unless a contrary intention of Congress is clearly manifested. * * *
>
> * * * It is generally recognized that the principal source of evidence that the commercial meaning contended for is general, definite and uniform throughout the wholesale trade at or prior to enactment of the involved statute should come from those persons who actually deal in or are conversant with the wholesale trade in which the merchandise travels and the designation it receives therein. * * *
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> * * * * * * *
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> * * * [A] finding of commercial designation requires that the testimony of witnesses in the trade or industry show, without substantial conflict, that at the time of enactment there was a

> definite, uniform and general meaning in the trade and commerce of the United States for the tariff term in issue which differs from its common meaning, and which either embraces or, as in this case, excludes the imported merchandise.

With these considerations before us, it is significant that the legislative history, the authorities cited previously, and the testimony of defendant's witnesses make it abundantly clear that not only Congress but also some sectors of the trade understood the term "candied pineapple" to include merchandise such as the imported pineapple with a brix value of 75°. Moreover, the Military Services Specifications for fruitcake ingredients issued in June 1961 (defendant's exhibit G) covers, among other things, "candied pineapple" and requires such pineapple to contain "not less than 75 percent soluble solids" which is less than the percentage plaintiff maintains is the minimum necessary to constitute "candied pineapple." Thus, plaintiff has failed to prove that the commercial designation of the term "candied pineapple" differs from its common meaning.

Finally, plaintiff states that the correctness of its claim is confirmed by the fact that from at least 1948 until 1971 *plaintiff's* entries of imported pineapple like that in issue were entered, classified and liquidated at ports of entry all over the United States (i.e., New York, Tampa, New Orleans, Baltimore, Los Angeles, West Palm Beach, Laredo and Hidalgo) as preserved pineapple, as now claimed by plaintiff. On this basis, we assume *arguendo* that plaintiff has proven the existence of a uniform and long-standing administrative practice to classify merchandise such as that involved here as "preserved pineapple." [14] In this setting, plaintiff argues that this long-continued administrative practice of almost 23 years should not be disturbed at this late date. See *United States* v. *H. Bayersdorfer & Co.*, 16 Ct. Cust. Appls. 43, 46, T.D. 42717 (1928).

A long-established practice by the Bureau of Customs will be given weight in the interpretation of the tariff statutes. *Commonwealth Oil Refining Company, Inc.* v. *United States*, 67 Cust. Ct. 37, 49–50, C.D. 4248, 330 F. Supp. 598, 608 (1971), *aff'd*, 60 CCPA 162, C.A.D. 1105, 480 F. 2d 1352 (1973). However, as pointed out in the appellate court decision in *Commonwealth Oil*, this practice is comparable to other extrinsic aids in ascertaining legislative intent when the construction of a statutory provision is doubtful. Thus, the appellate court stated (60 CCPA at 174, 480 F. 2d at 1361):

> Long-established administrative practice may bear on the construction of the tariff laws as noted by the Customs Court. See *United States* v. *Fred Whitaker Co.*, 40 CCPA 19, 29, C.A.D. 492

[14] Three of plaintiff's other witnesses were employed by firms that also imported like pineapple. However, the record is silent as to these other importers' experiences in importing such merchandise. Accordingly, it is questionable as to whether plaintiff has proven the existence of a uniform and consistently applied long-standing administrative practice to classify merchandise such as that at issue here as "preserved pineapple."

(1952); *United States* v. *Electrolux Corp.*, 46 CCPA 143, C.A.D. 718 (1959). However, this court has recognized such practice to be comparable to other extrinsic aids to ascertaining legislative intent which come into play when the construction of a statutory provision is in doubt. See *Armand Schwab & Co.* v. *United States*, 32 CCPA 129, 133, C.A.D. 296 (1945); *United States* v. *C. I. Penn*, 27 CCPA 242, 245–46, C.A.D. 93 (1940). Indeed, in *C. J. Tower & Sons* v. *United States*, 44 CCPA 41, 44, C.A.D. 634 (1957), the court expressed agreement with the proposition that an administrative practice prejudicial to the importer shown to be clearly erroneous would be reversible despite its age. * * *

The legislative history previously cited shows a clear Congressional intent for merchandise such as the importations to be classified as candied pineapple. A long-established administrative practice—while carrying weight when the meaning of a statute is doubtful—cannot be persuasive when contrary to the statute and its legislative history or otherwise erroneous. *Pittsburgh Plate Glass Co.* v. *United States*, 2 Ct. Cust. Appls. 389, 391, T.D. 32162 (1912); *United States* v. *Jules Raunheim (Inc.) et al.*, 17 Ct. Cust. Appls. 425, 431, T.D. 43867 (1930); *United States* v. *International Forwarding Co. et al.*, 18 CCPA 60, 67, T.D. 44028 (1930); *White Lamb Finlay, Inc.* v. *United States*, 29 CCPA 199, 205, C.A.D. 192 (1942).

The legislative history of item 154.45, as discussed above, is compelling in requiring classification of the importations as candied pineapple. Hence, it is concluded that the government's classification of the imported pineapple under item 154.45 is correct. Plaintiff's claim is therefore overruled and judgment will be entered accordingly.

(C.D. 4691)

Zenith Radio Corporation *v.* United States

Countervailing duty

Export Subsidy—Remission and Abatement of Taxes—Indirect Bounty or Grant

Various consumer electronic products of a kind produced in the United States by plaintiff, an American manufacturer, were produced in and exported from Japan into the United States; classified and assessed in liquidation with regular duties under the TSUS. Plaintiff petitioned the Secretary of the Treasury for the imposition of countervailing duties on such imported products in accordance with 19 U.S.C.A. § 1303, and following the denial of its administrative petition, instituted this action pursuant to 19 U.S.C.A. § 1516(d) as amended by the Trade Act of 1974 for judicial review of the negative countervailing duty determination of the Secretary of the Treasury.

On motion and cross-motion for summary judgment filed by the parties the record discloses that under Japanese Commodity Tax Law (March 31, 1962, Law No. 48) as revised, a single-stage consumption tax, ranging in amount from 5 to 40 percent, is levied at the manufacturing level on a fairly extensive list of consumer goods, inclusive of the imported products, and that upon exportation of these products from Japan the consumption tax is either remitted if previously paid, or is abated if not paid.

Held, the remission and abatement of consumption taxes by the Japanese Government under Commodity Tax Law No. 48 constitute the payment of a bounty or grant within the meaning of section 1303. *Downs* v. *United States*, 187 U.S. 496 (1903) followed.

Court No. 76-3-00637

[Plaintiff's motion granted;
defendant's cross-motion denied.]

(Decided April 12, 1977)

Stewart & Ikenson (*Eugene L. Stewart* and *Frederick L. Ikenson* of counsel), and *Philip J. Curtis* for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section, and *Velta A. Melnbrencis*, trial attorney), for the defendant.

Before RICHARDSON, NEWMAN and BOE, Judges[1]

RICHARDSON, Judge: Plaintiff, a domestic manufacturer of various consumer electronic products,[2] has instituted this action under 19 U.S.C.A., section 1303, for judicial review of the decision of the Secretary of the Treasury, and has moved for summary judgment pursuant to rules 4.12 and 8.2 of the rules of this court; and defendant has cross-moved for summary judgment. Plaintiff contends that the Government of Japan pays or bestows directly or indirectly a bounty or grant upon the exportation from that country of the aforesaid consumer electronic products in the form of the remission of, or exemption from, payment of a consumption tax to which these products would have been subjected had they not been exported. Defendant contends that the Japanese tax remission or exemption does not constitute a bounty or grant within the meaning of section 1303.

The essential facts of the controversy are not in dispute. The Japanese Commodity Tax Law, cited as Commodity Tax Law (March 31, 1962, Law No. 48) as revised, is a single-stage consumption tax

[1] The three-judge panel in this case was designated by the chief judge upon application of defendant pursuant to section 108 of the Customs Courts Act of 1970 (28 U.S.C.A. 255) and rule 4.13 of this court.

[2] Television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes.

which is levied usually at the manufacturing level on a fairly extensive list of consumer goods, inclusive of electronic products of the types manufactured by plaintiff. Rates of tax range generally from 5 to 40 percent. Upon exportation of these products from Japan, the tax is either remitted, if previously paid, or the products are exempted from the payment of the tax.[3]

Plaintiff petitioned the Secretary of the Treasury in 1970, alleging that the exemptions from or refund of the so-called "commodity tax" under the aforementioned Japanese Commodity Tax Law when the said electronic products were exported from Japan amounted to the payment or bestowal of bounties or grants directly or indirectly, upon the manufacture, or production in, or exportation from, Japan of said consumer electronic products. The petition asked the Secretary of the Treasury to impose countervailing duties on these imported products in accordance with section 1303. On January 7, 1976, a "Final Negative Countervailing Duty Determination" in the case of "Certain Consumer Electronic Products From Japan" was published in the Federal Register [41 Fed. Reg. 1298] at the instance of the Acting Commissioner of Customs upon the approval of the Acting Assistant Secretary of the Treasury. This determination stated that "a final determination is hereby made in this proceeding, that . . . no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [sic], production, or exportation of certain consumer electronic products from Japan."

Plaintiff after giving notice to the Secretary of the Treasury of its intention to contest this determination, which notice was duly published in the Federal Register [41 Fed. Reg. 10235], then instituted this action for a review of this determination in accordance with the provisions of 19 U.S.C.A., section 1516(d), as amended by the Trade Act of 1974. Section 1516(d), as amended, empowers this court to review, at the instance of American manufacturers, producers, or wholesalers, negative countervailing duty determinations made by the Secretary of the Treasury under 19 U.S.C.A., section 1303, relative to the existence of a bounty or grant on merchandise exported to the United States. The motions for summary judgment follow the joining of issue in said action. There is no question here but that the Japanese commodity tax in issue is either remitted when merchandise is exported from Japan if previously paid thereon, or the exported

[3] Tax exempt status is also accorded to certain other categories of goods, not here pertinent, which are sold domestically to or for schools, other educational institutions and educational use, academic research organs and academic research use, social welfare institutions and persons engaged in social welfare activities, the National Museum, and other persons specified by government ordinance. (Defendant's cross-motion for summary judgment p. 2.)

merchandise is not subject to the payment of tax. Plaintiff contends that the forgiveness of the commodity tax on exportation from Japan of the subject electronic products confers a direct or indirect benefit on the exportation of such products. Plaintiff argues:

> . . . The Supreme Court and the special customs tribunals have repeatedly held that the remission of taxes on exportation constitutes the conferral of a bounty or grant within the scope of our countervailing duty law. The legislative history of section 303 of the Tariff Act of 1930, as amended, provides ample support for that position. The forgiveness of the commodity tax on the exportation of the subject electronic products from Japan is clearly a bounty or grant under section 303, and the Secretary of the Treasury should be required to direct the assessment of countervailing duties to offset the bounty or grant so bestowed. [Brief in support of plaintiff's motion for summary judgment p. 5.]

Defendant contends that the Japanese commodity tax is not a bounty or grant within the meaning of section 1303. Defendant argues among other things:

> The historical and legislative background of the countervailing duty statute demonstrates that the countervailing duty provision was intended to cover only the excessive remission of taxes directly related to the imported product. For over 75 years the Treasury Department construed the provision as applying only to such excessive remissions. Since at least 1951, Congress has been well informed of the Treasury's practice and has consistently failed to countermand it even though legislative amendments rendering all tax remissions subject to countervailing duty have been considered. Thus, Congress must be deemed to have approved the administrative interpretation. [Brief in opposition to plaintiff's motion for summary judgment and in support of defendant's cross-motion for summary judgment p. 4.]

Section 1303 reads in relevant part:

> (a) Levy of Countervailing Duties.—(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.
>
> * * * * * * *

The court agrees with the plaintiff in this case, and concludes that as a matter of law the Japanese commodity tax remission or exemption in issue here constitutes a bounty or grant within the meaning of section 1303. As such, plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied.

Section 1303 has its genesis in section 5 of the Tariff Act of 1897 which reads:

> That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

In *Downs* v. *United States*, 187 U.S. 496 (1903), the Supreme Court of the United States held that tax remission is a form of indirect bounty within the meaning of section 5 of the 1897 Act. The *Downs* case involved an elaborate scheme of the Russian Government to control the production and price of sugar. Exporters of sugar were relieved of the ordinary excise tax which would have been payable had the sugar been sold domestically, and additionally, they received marketable certificates of value for their exports. These certificates could be sold to other sugar producers who would then be free to have their surplus sugar reclassified as free sugar and sold in the domestic market without the prohibitive tax burden that would otherwise have accompanied the sale of surplus. The Supreme Court, addressing itself to this scheme stated (p. 515):

> The details of this elaborate procedure for the production, sale, taxation, and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, viz.: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood and that sugar exported pays no tax at all. . . . When a tax is imposed upon all sugar produced, but is remitted upon all sugar

> exported, then, by whatever process, or in whatever manner, or under whatever name, it is disguised, it is a bounty upon exportation.

The *Downs* case was cited almost immediately by the Board of General Appraisers for the proposition that tax remission upon exportation constitutes the conferral of a bounty or grant under the 1897 Act. See *F. W. Myers & Co.* v. *United States*, 6 Treas. Dec. 260, 264–265, T.D. 24306 (1903). It was also cited for the same proposition in *Notes on Tariff Revision* (1908), a 953-page document prepared for the use of the Committee on Ways and Means, U.S. House of Representatives, under the direction of the clerk of the committee, when the Congress was considering revision of the 1897 Tariff Act. Thus, on page 834 of the notes under the heading *Countervailing duty*, the following statement, among others, appears:

> In Downs *v.* United States, 187 U.S., 496 (1903), *it was held that the remission of the excise tax imposed on sugar sold in Russia granted to the exporter of sugar*, which remission is awarded in the form of a certificate having a substantial market value, and the subject of purchase and sale, *is equivalent to a bounty*, and such sugar when imported into the United States is subject to an additional duty equal to the amount of such bounty. [Emphasis added.].

The preface to these notes contains a statement that "That part of the work relating to the interpretation of the law by the courts and by the Board of General Appraisers has been prepared by Thomas J. Doherty, esq., assistant counsel, United States Treasury Department . . . ."

Section 5 of the 1897 Act was reenacted essentially unchanged as section 6 of the 1909 Tariff Act. The words "province or other political subdivision of government" were added, by the 1909 Act, thus broadening the scope of the statute. Hence, reenactment by Congress of the same language in the aftermath of the *Downs* decision and on the representation made to Congress by so eminent an authority on judicial construction as the assistant counsel of the Treasury Department, represents a classical example of congressional ratification of the judicial construction put upon this statutory language. Indeed, this court said as much in *American Express Company* v. *United States*, 67 Cust. Ct. 141, 150–151, C.D. 4266 (1971), affirmed without reaching this issue, 60 CCPA 86, C.A.D. 1087 (1973), a case involving the construction of section 1303 [prior to amendment by the Trade Act of 1974] as applied to the practice of the Italian Government in its remission of certain internal taxes upon the exportation of transportation of transmission tower units to the United States. And inasmuch as this language has been a part of every United States countervailing duty statute dating from 1897, the argument advanced

by the Treasury Department that the teachings in *Downs* as to the countervailability of tax remission is *dicta*, is without support.

In this connection, the court notes that defendant advances the argument that Congress did not intend that the scope of section 5 of the 1897 Act should be any different than the predecessor statute was under the 1894 Act when nonexcessive tax remission was expressly excluded from the countervailing duty measure applied to bounty-fed sugar importations (paragraph 182½, Tariff Act of 1894), and that the legislative history indicative of such congressional intent "apparently had not been brought to the attention of the courts in prior cases." [See footnote 12, defendant's brief p. 13.] In other words defendant implies that the courts in *Downs* overlooked congressional limitations on the countervailing duty statute preserved for the 1897 Act from the 1894 Act as manifest in congressional debates.

It is true that the congressional proceedings culminating in section 5 of the 1897 Act were not a part of the record before the courts in *Downs*. Where the language of a statute is clear there is no need to resort to congressional debates to ascertain the intention of Congress. There is no indication that the language in section 5 of the 1897 Act lacked clarity or that it troubled the courts in any way in that case, necessitating resort by the courts to legislative history. And as for the congressional debates of the measure to which a large portion of defendant's energies have been directed, the Supreme Court had earlier warned against misdirection caused by reliance on remarks made during congressional debates, and as such, the debates would probably not have been considered relevant by the courts in *Downs*, anyway, given the clarity of the language of section 5. In *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 318 (1897), the Supreme Court noted:

> There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States* v. *Union Pacific Railroad Company*, 91 U.S. 72, 79; *Aldridge* v. *Williams*, 3 How. 9, 24, Taney, Chief Justice; *Mitchell* v. *Great Works Milling & Manufacturing Company*, 2 Story, 648, 653; *Queen* v. *Hertford College*, 3 Q. B. D. 693, 707.
>
> The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed. . . .

But even if congressional debates could have been considered in *Downs*, they would not have changed the results reached by the courts in that case. Paragraph 182½ of the 1894 Act had expressly excepted nonexcessive tax remissions from the specific countervailing duty applicable to bounty-fed sugar imports while recognizing tax remission to be a form of indirect bounty.[4] And of course, the term "net bounty" as used in the congressional debates on the measure by the 54th Congress clearly referred to the excess over the actual tax remitted. But the term "net amount of . . . bounty or grant" introduced into section 5 of the 1897 Act by the 55th Congress is another matter. Even in the House version of the countervailing duty measure which was passed and sent to the Senate it is to be seen that the House moved significantly away from the strictures of the countervailing duty provision as passed by the 54th Congress, in proposing alternative measures which, if enacted into law would have given the United States the option of countervailing the full bounty or just the excess bounty above the tax remitted. The House version provided that bounty-fed sugar "shall pay, in addition to the foregoing rates, a duty *equal to such bounty, or so much thereof* as may be in excess of any tax collected by such country upon such article, or upon the beet or cane from which it was produced." (Emphasis added.) 30 Cong. Rec. 316 (1897).

On the floor of the House, Representative Adolph Meyer of Louisiana, the center of the cane sugar growing industry in this country, after referring to testimony given in committee hearings by sugar importers at New York called attention to the full bounty provision in the House Bill H.R. 379 as follows (30 Cong. Rec. 317):

> . . . We suggested, wisely, I think, that instead of one-tenth of a cent duty upon bounty sugar imported into this country, the duty ought to be equal to the bounty.

And later on in the same speech Representative Meyer opted for adoption of the full bounty alternative as follows (30 Cong. Rec. 318):

> In view of this selfish and dangerous policy of Germany, it seems to me that we cannot well be too careful in our measures of prevention or too energetic in our countervailing duties. Instead of imposing upon the sugars of bounty-paying countries a tax equal to the excess of such bounty over the tax collected by the country of production upon such exported article, or upon the beet and cane from which it is produced, it would, I think, be far safer to put on and tax the full amount of the bounty that may have been given, and leave to the foreign governments the matter of adjusting their own taxation and bounties. We do not say to them, you shall or shall not impose this tax or this bounty, but we do say that when we find your export bounty or other device enables you to come here and undersell our own people, we will

[4] But even this exemption was conditional, and, not allowed where the requisite certificate was not produced. See T.D. 16641 (1895).

> meet you at the shore with a countervailing duty about which there shall be no quibbling or mistake. I may add here that the less the adjustment of the proper duty is complicated by needless questions of computation the simpler will be the duties of the customs collector, and the less opportunity afforded for mistakes or misconduct.

The Senate substituted language for the House version which later became section 5 following the House accession to the Senate amendment. And after the Senate version was introduced through the Senate Finance Committee, the term "net bounty" was never used in the debates that followed in reference to the Senate proposal. On the contrary, the full amount of the German bounty (38 cents on refined sugar or 27 cents on raw sugar per hundred weight) was referred to by the senators as the "export bounty." See, e.g., 30 Cong. Rec. 2204 (remarks of Mr. Gray) (1897); 30 Cong. Rec. 2224 (remarks of Messrs. Caffery, Chandler) (1897); 30 Cong. Rec. 2825 (remarks of Messrs. Jones, Aldrich) (1897).

Since it is clear that the Senate debates indicate an intention on the part of that body of Congress to reach the full amount of the bounty paid under the language it proposed, the term "net amount of . . . bounty . . ." was obviously intended to apply to nothing less than the full amount of the benefit foreign exporters derived from their governments. But the Senate didn't stop here. In addition, it introduced the words "grant" and "bestow" for the first time in the countervailing duty measure. The Senate was fully aware of the new German sugar tax law which was enacted in 1896, and of its increased bounties and burdensome consumption tax which it imposed upon the consumption of sugar by the German people—a burden which drew reactions of disapproval and adverse comment by various senators who participated in the debates. The new consumption tax amounted to approximately $2.16 per pound. However, sugar exported under sugar control was expressly exempt from this tax. Consequently, one need not have been a sugar expert to appreciate that exemption from the consumption tax alone (disproportionately higher than the bounties paid) would continue to stimulate exportation of sugar surplus from Germany *even if the bounties were not paid*, and thus continue to imperil the then incipient U.S. cane sugar production, unless checked by a countervailing duty measure.

Hence, it would appear that the new sugar tax levied by Germany against its people when sugar was consumed in Germany but excused when sugar was exported from Germany became the catalyst which triggered the employment of such sweeping language in the Senate countervailing duty proposal. And the words chosen were eminently appropriate to reach such tax abatement. As the Board of General

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Appraisers aptly pointed out with respect to the word "grant" in *Downs* (4 Treas. Dec. 405, T.D. 22984 (1901) at page 408) "While it involves the idea of a favor or benefit conferred by the Government, sometimes of an exclusive character, it does not necessarily embrace the act of appropriating or paying money out of the public treasury. Indeed, the word 'grant,' in its broad signification, may well include the remission of a tax already levied and assessed by the authority of Government." And again, as the Supreme Court said in *Nicholas & Co.* v. *United States*, 249 U.S. 34 (1919) at page 39: "If the word 'bounty' has a limited sense the word 'grant' has not. A word of broader significance than 'grant' could not have been used."

There can be no question then, but that the 55th Congress was faced with a different challenge than that which confronted the 54th Congress, and as a consequence, responded to it with equally different legislation. As stated by the former clerk of the House Committee on Ways and Means in *Notes on Tariff Revision*, *supra* at page 834 with respect to section 5 of the 1897 Act, "This section was a new departure in tariff legislation . . . ."

There are other contentions advanced by the Government in connection with additional legislation enacted by Congress and international commitments of the United States involving policy decisions which do not supersede the acts of Congress. The court finds that the matters dealt with in these contentions do not temper the mandatory character of the countervailing duty statute in issue or illuminate the congressional intent underlying its enactment.

With respect to the Government's contention concerning the United States' commitment under Article VI(4) of Part II of the GATT,[5] it must be pointed out here that this contention has previously been considered and rejected by the courts. In *American Express Company* v. *United States*, *supra* at page 152, this court said with respect to this argument:

> . . . GATT is a trade agreement, which if in conflict with a law of Congress [19 U.S.C.A. § 1303], must yield to the latter.

And our appeals court went even further in that case in regard to this argument when it said [60 CCPA at page 97, footnote 14]:

> That holding finds support not only in the reasoning of the Customs Court that a law of Congress prevails over a trade agreement but also in the fact that the United States undertook Part II of the GATT, which includes Article VI(4), "* * * to the fullest extent not inconsistent with existing legislation." *Protocol of Provisional Application of the GATT*, 61 Stat. A2051 (1947).

[5] This provision expressly prohibits contracting parties from levying countervailing duties against each other's products to offset export bounties aiding their exportation where the bounties are in the form of tax remissions or tax exemptions; and the Government maintains that such contractual obligation is binding on the United States.

Thus, it becomes readily apparent that although our countervailing duty statute [section 1303] speaks in more general terms of *bounties* and *grants* whereas the countervailing duty provision contained in Article VI(4) of Part II of the GATT refers specifically to exemption from or refund of taxes, the GATT's inconsistency "with existing legislation," has been determined by the construction put upon the statutory terms "bounty" and "grant" by the Supreme Court of the United States in *Downs* v. *United States*, *supra*, in holding that tax abatement or remission comes within the meaning of those terms.

The court does find it somewhat incongruous for defendant, while insisting that Congress did not intend that tax remission be countervailed under section 5 of the 1897 Act and that the Supreme Court did not so construe that statute in *Downs*, to assert in its brief (p. 15): "Of course, when the taxes are not directly related to the imported product . . . their remission constitutes the bestowal of a bounty or grant upon the exportation of the product."

The defendant represents that it has had a long standing administrative interpretation of the countervailing duty statute which permits it to determine when in its judgment a bounty or grant is excessive and thus should be countervailed. This administrative interpretation is in conflict with the decisions of the Supreme Court of the United States construing the countervailing statute, and must yield.

The Secretary of the Treasury, in administering the countervailing duty statute, must discharge his responsibility in accord with the congressional intent in that statute as interpreted by the Supreme Court of the United States.

The language of section 1303 is abundantly clear, having been construed by the courts in decisions which in turn have been approved by Congress. Generally, the scope of the statute has been held by the courts to be extremely broad; specifically, the statute has been held to embrace remissions of indirect taxes on exportation.

> It is a familiar rule that long-established administrative practice is determinative only when the meaning of the statute is doubtful. *Pittsburgh Plate Glass Co.* v. *United States*, 2 Ct. Cust. Appls. 389, T.D. 32162. . . . Therefore, an administrative practice in plain violation of the terms of the statute cannot be urged as determining the construction that should be given to it. [*United States* v. *Jules Raunheim (Inc.) et al.*, 17 CCPA 425, 431 (1930).]

See also: *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 278 (1933); *Federal Power Commission* v. *Pacific Power & Light Co. et al.*, 307 U.S. 156, 160 (1939); *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940).

Admittedly a decision adverse to either party will have certain effects upon domestic industry and labor. It has been ruled that this court does not have equity jurisdiction, and it would be inappropriate for the court to go beyond the statute governing the issue before it and attempt to balance the equities between industry and labor. Also, if this court were empowered to wade into the uncertain waters of foreign policy it might yield to the tempting protestations of defense counsel and assume the risk of making a determination in this area, but this is an area reserved to the executive and legislative branches of the Government.

The Japanese commodity tax involves the remission of an indirect tax and, as such, is countervailable under section 1303.

Judgment will be entered in accordance with this opinion.

NEWMAN, Judge, concurring: While I join in the opinion of Judge Richardson, which concludes that the remission of the commodity tax on the exportation of the subject Japanese consumer electronic products [1] constitutes the bestowal of a bounty or grant under our countervailing duty law, I add this concurring opinion to that of Judge Boe to elaborate on my views concerning the pivotal issues raised in the briefs of the parties.

We are confronted with an issue of grave import affecting a broad spectrum of this nation's international trade, as well as a substantial segment of the domestic industry in the United States. According to former Assistant Secretary of the Treasury David R. Macdonald, the remission of indirect (viz., consumption) taxes "is a universal practice, and one in which this Country engages, also!" [2] Moreover, Japan is one of the most important trade partners of the United States, and indeed is our second largest market for exports. Hence, it is needless to say that the United States has a vital and continuing interest in a harmonious trade relationship with Japan and its exporting community.

The United States has had a general countervailing duty statute since the Tariff Act of 1897,[3] and importers have always been accorded the right to a judicial review of countervailing duty assessments by the Treasury Department. However, it was not until the amendment of section 516 of the Tariff Act of 1930 by sections 321(f)(1) and 331(b) of the Trade Act of 1974, Public Law 93-618 (1975), that American producers could obtain judicial review of a *negative* counter-

[1] These products include: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes.

[2] Press briefing on October 20, 1975 by David R. Macdonald, former Assistant Secretary, Enforcement Operations and Tariff Affairs, on rejections of petitions in steel countervailing duty cases; transcript of proceedings, page 9, annexed to plaintiff's reply brief as an exhibit.

[3] Predecessor countervailing duty provisions in the Tariff Acts of 1890 and 1894 were limited in their application to certain sugar imports.

vailing duty determination by the Secretary of the Treasury.[4] This civil action is the first presented for decision under the court's expanded jurisdiction under section 516, as amended. In overriding the Secretary's negative determination, and directing the imposition of countervailing duties on the subject Japanese exports, this court is not oblivious to the possible ramifications concerning this country's trade relations with Japan.[5] However, the proper exercise of our judicial function requires that we interpret and apply the law unrestrained by extra-legal considerations more appropriately addressed to legislative policy. Predicated upon the broad, explicit, and mandatory terms of section 303, as amended, the clear intent of Congress and the unequivocal judicial construction of the statute by the Supreme Court, I agree with the conclusion that the commodity tax exemption or rebate on exportation of the involved electronic products from Japan constitutes the payment or bestowal of a bounty or grant subject to countervailing duties.

Legislative History

Defendant heavily relies upon the legislative history of the countervailing duty provisions in the Tariff Acts of 1890, 1894 and 1897, contending such history demonstrates that nonexcessive tax remissions (i.e., refunds or rebates not exceeding the taxes paid by the producer to the foreign government) were not within the contemplation of Congress, and thus are excluded from the statute.

In the 1890 and 1894 provisions cited by defendant,[6] countervailing duties were applicable only to importations of certain sugar. The 1894 statute contained a proviso which relieved an importer of the countervailing duty if he produced a certificate from the government of the country of exportation to the effect that no indirect bounty

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[4] See *United States* v. *Hammond Lead Products, Inc.*, 58 CCPA 129, C.A.D. 1017, 440 F. 2d 1024 (1971), *cert. denied* 404 U.S. 1005 (1971), reversing a decision of the Customs Court, First Division, *Hammond Lead Products, Inc.* v. *United States*, 63 Cust. Ct. 316, C.D. 3915, 303 F. Supp. 480 (1969). The appellate court's decision in *Hammond Lead* was nullified by Congress in the 1974 Trade Act amendment to section 516, Tariff Act of 1930. The report of the Ways and Means Committee explains the purpose of the amendment (H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 76 (1973)):

> Section 331(b) of the bill would amend subsections (a), (b), and (c) of section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516), to provide for judicial review of negative countervailing duty determinations by the Secretary of the Treasury. The amendment was necessitated by a 1971 decision of the Court of Customs and Patent Appeals (*United States* v. *Hammond Lead Products, Inc.*, 58 CCPA 129, C.A.D. 1017), which held that judicial review of negative countervailing duty determinations was not available to domestic producers. Your committee is concerned that this decision might adversely affect the ability of American producers to obtain meaningful relief under the countervailing duty law, and believes that the amendment is also warranted, equitably, because American producers have a right to judicial review in the customs courts of other customs determinations involving duty assessments, and importers are entitled to judicial review of the actual assessment of countervailing duties.

[5] In this connection see: Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 Va. J. of Int'l. L. 82, 147-148 (1969).

[6] Schedule E (sugar schedule), paragraph 237, Tariff Act of 1890, 26 Stat. 567, 584; schedule E (sugar schedule), paragraph 182½, Tariff Act of 1894, 28 Stat. 509, 521.

was received upon the sugar "in excess of the tax collected upon the beet or cane from which it was produced", and that no direct bounty had been or was to be paid.

Unlike the countervailing duty provisions in the Tariff Acts of 1890 and 1894 (which were applicable only to sugar), section 5 of the Tariff Act of 1897 [7] generalized the countervailing duty concept, and made additional duties applicable to all dutiable importations. Further, there was no exception made in the 1897 statute for nonexcessive tax remissions similar to the proviso included in the 1894 sugar schedule provision. This 1897 generalized countervailing duty law was carried over (with certain amendments not pertinent here) into the subsequent Tariff Acts of 1909, 1913, 1922 and 1930.[8]

Predicated upon congressional debates and various fragments of legislative history, defendant strenuously argues that the 1897 countervailing duty provision, although couched in general terms, was principally intended to compensate for the export bounty system employed by Germany in connection with sugar exports; that Congress was aware that the German government did not collect an internal consumption tax on exported sugar, but nevertheless was concerned only with countervailing the so-called "net bounties" paid to German exporters of sugar, viz., bounties paid in excess of the amount which the exporter was required to pay the German government; that the proviso portion of the 1894 countervailing duty statute shows that the 1897 law was designed only to compensate for the German system of providing for a net bounty; and that the 1897 generalized countervailing duty statute was not intended to change this net bounty concept or to impose a countervailing duty due to the failure of Germany to collect an internal consumption tax on exported sugar.

In short, defendant's position is that the legislative history of the 1894 and 1897 countervailing duty provisions shows that an excessive tax remission directly related to the exported product was the type of indirect bounty or grant which was of principal concern to Congress; and that in utilizing the term "net amount" in section 5 of the 1897 Act, Congress intended thereby to express and incorporate the excessive refund concept of the proviso contained in paragraph 182½ of the 1894 statute.

I see nothing in the legislative history relied upon by defendant which is persuasive that by using the term "net amount" in the generalized 1897 countervailing duty provision Congress intended to continue the exception in the proviso of the 1894 law for nonexcessive

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[7] 30 Stat. 151, 205.

[8] Section 6, Tariff Act of 1909, 36 Stat. 11, 85; paragraph E, Tariff Act of 1913, 38 Stat. 114, 193; section 303, Tariff Act of 1922, 42 Stat. 858, 935; section 303, Tariff Act of 1930, 46 Stat. 590, 687.

tax remissions. While the legislative history cited by defendant indicates that sugar bounties paid by Germany were of major concern to Congress when the bill which became the Tariff Act of 1897 was debated, Congress nevertheless generalized the countervailing duty provision so that it was no longer specifically addressed to importations of sugar (or any other product) nor specifically addressed to indirect bounties in the form of excessive tax remissions. Looking at the new broad and inclusive language of the 1897 statute as a whole, Congress encompassed therein *all* dutiable products,[9] and *any* bounty or grant, direct or indirect, however the same be paid or bestowed, with duties to be assessed "*in all such cases*". Accordingly, I am not persuaded that by merely inserting the term "net amount" in the 1897 statute Congress intended to resurrect the proviso in the 1894 sugar schedule provision or to exclude indirect bounties in the form of a tax exemption or "nonexcessive" rebate.

Judicial Construction

In *United States* v. *Passavant*, 169 U.S. 16 (1898), the effect of a tax rebate on the dutiable value of certain goods exported from Germany was considered by the Supreme Court. Although countervailing duties were not involved in the case, Chief Justice Fuller's economic analysis of the German tax rebate scheme is illuminating (169 U.S. at 22–23):

> The certificate of facts states that the German duty is imposed on merchandise when "sold by the manufacturers thereof for consumption or sale in the markets of Germany;" and "is collected when the finished product goes into consumption in Germany." As the tax accrues when the manufacturer sells, his wholesale price includes it, and the purchaser who buys these cotton velvets in wholesale quantities in the German markets pays a price covering the tax, and that is the price for the merchandise when bought and sold in those markets.
>
> *Doubtless, to encourage exportation and the introduction of German goods into other markets, the German government could remit, or refund the tax, pay a bonus, or allow a drawback.*
>
> And it is found that in respect of these goods when "purchased in bond, or consigned while in bond, for exportation to a foreign country, this duty is remitted by the German government, and is called 'bonification of tax,' as distinguished from being refunded as a rebate." The use of the word "bonification" does not change the character of this remission. *It is a special advantage extended by government in aid of manufactures and trade, having the same effect as a bonus or drawback. To use one of the definitions of drawback, it is "a device resorted to for enabling a commodity affected*

[9] Section 331 of the Trade Act of 1974 made the countervailing duty law applicable, under certain circumstances, to duty-free imports for the first time in the law's history.

by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all." [Emphasis added.]

Passavant was cited by the Supreme Court in two landmark decisions construing the scope of the 1897 general countervailing duty statute, which is the progenitor of section 303, as amended: *Downs* v. *United States*, 187 U.S. 496 (1903); and *Nicholas & Co.* v. *United States*, 249 U.S. 34 (1919). These decisions have been discussed in the opinions of my colleagues, and it is unnecessary to further elaborate upon them here. Suffice it to state that the Supreme Court has unequivocally enunciated that the rebate or remission of a tax on exported products where such taxes have been imposed on a domestic sale in the country of exportation constitutes a bounty or grant under the countervailing duty statute.[10] Defendant, on the other hand, is unable to cite any decision which holds that a nonexcessive tax remission upon exportation is not a bounty or grant under the statute.

After the *Downs* decision, the countervailing duty provision was periodically reenacted by Congress, but was never amended to except tax remissions from its ambit. Fundamentally, such repeated reenactments without excepting tax remissions is significantly indicative of a congressional intent to approve the judicial construction of the countervailing duty statute. *United States* v. *D. H. Grant & Co., Inc.*, 47 CCPA 20, C.A.D. 723 (1959); *United States* v. *Loffredo Bros.*, 46 CCPA 63, C.A.D. 697 (1958); *United States* v. *Astra Trading Corp.*, 44 CCPA 8, C.A.D. 627 (1956).

Administrative Practice

Citing a number of published decisions of the Secretary of the Treasury dating back to 1898 [11] and other official actions, defendant contends that "the Department of the Treasury has consistently and uniformly interpreted the countervailing duty statute from its inception as not including within the terms 'bounty or grant' a remission or refund of taxes which does not exceed the taxes actually imposed."[12]

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[10] The *Downs* and *Nicholas* decisions have been cited and followed by the Customs Court in two countervailing duty cases involving tax remission schemes: *Hammond Lead Products, Inc.* v. *United States*, *supra*, 63 Cust. Ct. 316, *rev'd on jurisdictional grounds*, *United States* v. *Hammond Lead Products, Inc.*, *supra*, 58 CCPA 129, *cert. denied* 404 U.S. 1005 (1971); and *American Express Company* v. *United States*, 67 Cust. Ct. 141, C.D. 4266 (1971), *aff'd on other grounds*, 60 CCPA 86, C.A.D. 1087, 472 F. 2d 1050 (1973).

[11] T.D. 19321, 1 Synopsis of Dec. 696 (1898); T.D. 19729, 2 Synopsis of Dec. 157 (1898); T.D. 20407, 2 Synopsis of Dec. 996 (1898); T.D. 34466, 26 Treas. Dec. 825 (1914); T.D. 42895, 54 Treas. Dec. 101 (1928); T.D. 43634, 56 Treas. Dec. 342 (1929); T.D. 49355, 73 Treas. Dec. 107 (1938).

Respecting "long-established administrative practice" as it bears on the construction of tariff laws, see Judge Lane's opinion in *Commonwealth Oil Refining Company* v. *United States*, *United States* v. *Commonwealth Oil Refining Company*, 60 CCPA 162, C.A.D. 1105, 480 F. 2d 1352 (1973).

[12] In *Executive Branch GATT Studies*, Senate Committee on Finance, 93d Cong., 2d Sess. (1974), Congress was informed (pages 11-12):

> Under administrative precedents dating back to 1897, the Treasury Department has generally not construed the rebate, remission or exemption on exports of ordinary indirect taxes (consumption taxes on

Further, defendant asserts that Congress has been well informed concerning Treasury's practice since at least 1951, and therefore "must be deemed to have approved the administrative interpretation of the countervailing duty statute".

Plaintiff does not dispute the existence of the administrative practice relied on by defendant, but urges that the administrative interpretation is entitled to no weight in view of *Downs* and *Nicholas*. Plaintiff also denies any congressional approval of the Treasury's practice.

I find defendant's reliance upon its administrative construction and the asserted congressional ratification thereof to be misplaced in the instant case for the following reasons:

First, the Treasury's administrative practice has been, and presently is, in direct conflict with the teachings of *Downs* and *Nicholas*. Fundamentally, where decisions of the Supreme Court and an administrative practice are in conflict, it is the decisions rather than the practice which Congress must be presumed to have ratified when reenacting the statute. *Cf. Atalanta Trading Corp.* v. *United States*, 32 Cust. Ct. 19, C.D. 1574, *aff'd* 42 CCPA 90, C.A.D. 577 (1954); *United States* v. *Douglas & Berry*, 6 Ct. Cust. Appls. 100, T.D. 35342 (1915). See also: *United States* v. *Bassichis Co.*, 16 Ct. Cust. Appls. 410, T.D. 43133 (1928) (legislative approval of judicial interpretation and administrative practice distinguished).

Second, when Congress considered the proposed Customs Simplification Acts of 1950 (H.R. 8304, 81st Cong., 2d Sess.) and 1951 (H.R. 1535, 82d Cong., 1st Sess.),[13] the Treasury Department attempted to persuade Congress to amend the countervailing duty law to provide that the exemption or refund of taxes on goods exported to the United States would not be countervailable. The Department's proposed legislation provided as follows:

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* * * * * * *

goods) to be a "bounty or grant" within the meaning of our countervailing duty statute (Section 303, Tariff Act of 1930; 19 U.S.C.A. 1303). These precedents have been applied as a general rule with regard to all consumption taxes on goods. The precedents are based on the principle that, since exports are not consumed in the country of production, they should not be subject to consumption taxes in that country. The theory has been that the application of countervailing duties to the rebate of consumption taxes would have the effect of double taxation of the product, since the United States would not only impose its own indirect taxes, such as Federal and state excise taxes and state and local sales taxes, but would also collect, through the use of the countervailing duty, the indirect tax imposed by the exporting country on domestically consumed goods.

The Treasury Department has not applied these precedents to tax "rebates" in excess of taxes collected on the exported product. If, for example, the foreign exporter has paid $1 in excise taxes on a product he exports to the United States but receives a rebate of $1.20 on exportation, under long-established administrative precedents of the Treasury Department the imported merchandise would be subject to a countervailing duty of $0.20.

[13] H.R. 1535 was replaced by H.R. 5505, 82d Cong., 1st Sess. (1951).

> (c) * * * The exemption of any exported article or merchandise from a duty or tax imposed on like articles or merchandise when destined for consumption in the country of origin or exportation, or the refunding of such a duty or tax, shall not be deemed to constitute a payment or bestowal of a bounty or grant within the meaning of this section.

The purpose of the proposed amendment and Treasury's rationale in seeking an amendment of the countervailing duty statute were expressed in the Department's analyses, which reported the following (*Analysis of Customs Simplification Act of 1950*, 5; *Analysis of the Customs Simplification Act of 1951*, 5):

> * * * Subsection (c) would also add a provision that countervailing duty shall not be levied because of the ordinary remission or refund of taxes and duties allowed on exportation by most nations, including the United States. Under the existing administrative interpretation of section 303 of the Tariff Act, countervailing duty is not imposed in such situations, but some judicial comments on the statutes do not make it clear that the courts would consider such duty or tax exemptions as outside the scope of the countervailing duty provision. The proposed amendment eliminates the possibility of rulings in conflict with the administrative practice which has been followed for over 50 years.

Congress carefully considered, but rejected the Treasury's proposed amendment, despite the Department's statement that the proposed amendment would conform the countervailing duty statute to the administrative interpretation and practice.[14] It is apparent, then, that Congress could have, but declined to, nullify the Supreme Court's interpretation of the countervailing duty statute insofar as tax remissions are concerned. A reasonable conclusion from the congressional rejection of the Treasury's proposed amendments in 1950 and 1951 is that Congress was satisfied with the way it had earlier written the statute, and approved of the Supreme Court's construction of the law.

Third, when Congress was considering what was to become the Trade Act of 1974, Public Law 93–618 (1975), Treasury's practice under section 303 of applying a "directly related" test to tax remissions was brought to Congress' attention. The executive branch proposed an amendment to section 203 of the Antidumping Act of 1921, 19 U.S.C. § 162 (purchase price),[15] and explained its purpose as follows (Committee on Ways and Means, U.S. House of Representa-

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[14] Treasury's proposal to amend the countervailing duty statute to require a finding of injury, so as to conform our statute with the GATT rule on countervailing duties, was similarly rejected.

[15] "It should be kept in mind that the Countervailing Duty Law and the Antidumping Statute are opposite sides of the coin. The former deals with subsidized imports entering this country; the latter deals with imports being sold at less than fair value in this country (meaning imports that are sold here at less than they are sold for in the country of export)." King, *Countervailing Duties—An Old Remedy with New Appeal*, 24 Bus. Law. 1179, 1181 (1969).

tives, *Press Release and Other Material Relating to the Administration Proposal Entitled the "Trade Reform Act of 1973" Transmitted to the Congress on April 10, 1973*, 93d Cong., 1st Sess. 89–90 (1973)):

> The second amendment deals with the treatment of certain types of tax rebates in computing purchase price. The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. With the amendment, no adjustment to the advantage of the foreign exporter would be permitted for indirect tax rebates unless the direct relationship of the tax to the product being exported, or components thereof, could be demonstrated.
>
> The Treasury Department considers rebates or remissions of taxes not directly related to an exported product or its components as being bounties or grants within the meaning of the countervailing duty law. Under the Antidumping Act, Treasury is required in its calculation of purchase price to add back to the price at which merchandise is sold to the United States "the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, in respect to the manufacture, production, or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States." The "adding back" of such taxes under the Antidumping Act would have the effect of reducing or eliminating any dumping margins that may exist. The language of the Antidumping Act "in respect to the manufacture, production or sale of the merchandise" is somewhat broader than the standard applied to tax rebates under the countervailing duty law (directly related to the exported product or its components) and could result in inconsistency of treatment of tax rebates under the two laws.

Although Congress adopted the proposed amendment to section 203 of the Antidumping Act (see section 321 of the Trade Act of 1974), significantly the House Ways and Means Committee pointed out (H.R. Rep. No. 93–571, 93d Cong., 1st Sess. 69 (1973)):

> * * * The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. However, your committee, in recommending this amendment, does not express approval or disapproval of the standard employed by the Treasury Department in administering the countervailing duty law with regard to the treatment under that law of rebates or remissions of direct and indirect taxes.

The Senate Finance Committee adopted a similar stance in its report (S. Rep. No. 93–1298, 93d Cong., 2d Sess. 172 (1974)):

> * * * The standard in the proposed amendment parallels that standard employed by the Treasury Department under the countervailing duty law in determining whether tax rebates and remissions constitute bounties or grants. However the Com-

mittee, in recommending this amendment, does not express approval or disapproval of that Treasury practice.

Consequently, the short of the matter is that Congress has not ratified the Treasury's practice under the countervailing duty law.

International Understanding

Pursuant to Article VI(4) of the General Agreement on Tariffs and Trade (GATT), the imposition of countervailing duties is prohibited "by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes." [16] The effect of Article VI(4) of the GATT is that the rebate or remission of indirect taxes (i.e., consumption taxes) is exempted from countervailing duties, whereas the remission or rebate of direct taxes (i.e., income taxes) is subject to countervailing duties. See: Marks and Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 Law & Pol. Int'l Bus. 327, 351 (1975); King, *Countervailing Duties—An Old Remedy With New Appeal*, 24 Bus. Law. 1179, 1185–86 (1969).

Defendant urges that "[a] construction of the term 'bounty or grant' so as to exclude the remission of the Japanese commodity tax is consistent with international understandings".

When the United States and other signatories acceded to GATT, they agreed to undertake Part II thereof (which includes Article VI(4)) "* * * to the fullest extent *not inconsistent with existing legislation*". (Emphasis added.) *Protocol of Provisional Application of the GATT*, 61 Stat. A2051 (1947).[17] Unlike the GATT our countervailing duty law contains no exception for exemptions from or rebates of taxes—direct or indirect. Therefore, Article VI(4) of the GATT is inconsistent with the preexisting countervailing duty law, and must yield to the statute. Moreover, GATT could not in any event modify or rescind an existing act of Congress (viz., section 303), as Congress never delegated any authority to the executive branch to amend the countervailing duty law. See *American Express Company* v. *United States*, 67 Cust. Ct. 141, 152, C.D. 4266 (1971), *aff'd* 60 CCPA 86, 97 (footnote 14), C.A.D. 1087, 472 F. 2d 1050 (1973).

Additionally, it is noted that economists and legal commentators have increasingly challenged the economic underpinnings for the administrative adherence to the distinction between remissions of direct and indirect taxes. The administrative policy distinguishing between remissions of direct and indirect taxes is explained by defendant in its brief in opposition to plaintiff's motion (pages 41–42):

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[16] Also, Ad Article XVI of Annex I, added to the GATT in 1955, further clarifies the rule as follows: "The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy".

[17] This provision is commonly referred to as the "grandfather clause".

> The non-countervailing of non-excessive remissions of taxes directly related to the imported product is based on the principle that since exports are not consumed in the country of production, they should not be subject to consumption taxes in the country of production. This leaves the importing country free to impose its taxes on the imported merchandise. Otherwise, the same goods would be subject to double taxation on its consumption, first in the manufacturing country, then in the importing country. The different treatment of different types of taxes rests further on the long-standing assumption that certain so-called indirect taxes (those levied directly on the sale of products, such as excise, sales, and turnover taxes and only indirectly on income or profits) are shifted forward to the ultimate consumer, while so-called direct taxes (those levied directly on income or profit rather than on products) are absorbed by the producer, i.e., are shifted backward and do not affect the price of the product sold to the consumer. The general assumption, in international trade treatment, is that the indirect taxes (which affect the sales price) should be levied in the country of sale of the product while the direct taxes (which do not affect the sales price) should be levied in the country where the product is produced. [Footnote omitted.] By the same token, it is the almost universal assumption that the exemption of an article from a general consumption tax in the country of manufacture gives no incentive to the manufacturer to seek the foreign market as opposed to the domestic.

It is emphasized that the foregoing quotation is accepted as an explanation of Treasury's position but not as a justification.

In a paper for the Twenty-First Annual Conference of the Canadian Tax Foundation, Toronto, November 20, 1968, former Assistant Secretary of the Treasury John R. Petty stated:[18]

> Modern economic theory suggests that the distinction implicit in the GATT treatment of direct and indirect taxes is an extreme and arbitrary assumption which does not stand the test of economic reality. While economists and businessmen may disagree on the extent of the forward shifting of indirect and direct taxes, they do agree that the extreme assumptions which are necessary to make the present GATT rules trade neutral are an inadequate approximation of reality. Therefore, a border adjustment equivalent to the full internal indirect tax tends to stimulate exports and provide protection against imports. In brief, the present provisions of GATT divert trade and thereby disadvantage countries such as the United States and Canada which rely primarily on direct taxes. [Footnotes omitted.]

Marks and Malmgren, in their article cited *supra*, commented (7 Law & Pol. Int'l Bus. at 351):

> Under GATT Article VI(4), any rebates, upon exportation, of direct taxes, e.g., income and social security taxes, are impliedly countervailable, while rebates of indirect taxes are not

[18] A copy of this paper was submitted as an exhibit annexed to plaintiff's reply brief.

countervailable. The Treasury, in its administrative actions, has followed the GATT rules. The GATT distinction between rebates of direct and indirect taxes was established at a time when most economists made the working assumption that indirect taxes are fully passed on to the consumer, while direct taxes are not. Following this rationale, the GATT, with the concurrence and drafting assistance of the U.S. negotiators, provided for different treatment of rebates of direct, as contrasted with indirect, taxes.

Most economists now appear to be more cautious in accepting this working assumption. There seems little doubt that indirect taxes frequently are not passed fully through to the consumer, while direct taxes often are partially or fully passed on. The incidence of taxation often depends on whether there exists a buyers' or sellers' market, expressed by the relative elasticity of demand or supply of the product under consideration, rather than whether the tax is direct or indirect. No definitive quantitative study has been found describing the extent to which direct and indirect taxes are, or are not, passed through. [Footnotes omitted.]

See also: *The Michelin Decision: A Possible New Direction for U.S. Countervailing Duty Law*, 6 Law & Pol. Int'l Bus. 237, 246–47 (1974); Rosendahl, *Border Tax Adjustments: Problems and Proposals*, 2 Law & Pol. Int'l Bus. 85, 88–98 (1970); Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments and the Resurgence of the Countervailing Duty Law*, 1 Law & Pol. Int'l Bus. 17, 50–54 (1969); *The United States Submission on Border Tax Adjustments*, February 16, 1966, to Working Party No. 4 of the Council on Border Tax Adjustments, Organization for Economic Co-operation and Development (copy annexed to plaintiff's reply brief as an exhibit); King, *Countervailing Duties—An Old Remedy with New Appeal*, *supra*, at 1188–90.

Indeed, the Treasury Department itself has publicly conceded that no distinction should be made between remissions of direct and indirect taxes in enforcement of the countervailing duty law. At a press briefing in connection with the rejection of countervailing duty petitions filed by United States Steel Corporation, former Assistant Secretary of the Treasury Macdonald stated that in determining whether there is a "subsidy" on export due to the remission of the value-added tax "[t]here is a distinction, in this area, that has been adopted and maintained by the Treasury Department, and that is reflected in the GATT—in our General Agreement on Tariff and Trade—between 'direct' taxes and 'indirect' taxes". Continuing, Mr. Macdonald stated:

> The Treasury Department has consistently followed this distinction and has, in the past, countervailed against the remission of *direct* taxes.

Okay. Having made that distinction, I just want to make this additional point: The fact that we have not found the remission of value-added taxes to be a bounty or grant within the meaning of our law, does not mean that the United States Government is wild about other taxes of this sort. In fact, if there was one thing that was quite persuasive in the petition filed by U.S. Steel, it was their economic argument that, *in fact, there should be no distinction between direct and indirect taxes.*

We believe that, while we are making this decision in consonance with our prior precedents—we believe that this is a subject which requires very serious negotiations because *the distinction between so-called "direct" taxes and so-called "indirect" taxes, economically speaking, may well be chimerical.* [Emphasis added in part.]

Okay. Any questions?

* * * * * * *

MEMBER OF THE PRESS: Is the Treasury now tinkering with changing the direct and indirect [tax distinction], and considering it as one?

SECRETARY MACDONALD: I think it is fair to say that the United States Government is in favor of changing it.[19]

In sum, I have determined that the direct-indirect tax dichotomy (and the discredited underlying tax shifting assumptions) upon which the Treasury's administration of the countervailing duty law has been premised has no economic or legal justification.

NONEXISTENCE OF GENUINE ISSUE OF FACT CONCERNING ECONOMIC BENEFITS OF TAX REBATING TO JAPANESE EXPORTERS

Finally, defendant contends there is a genuine issue of fact precluding summary judgment concerning certain economic benefits of the tax remission to the Japanese exporters.

Zenith's complaint alleges that the tax exemption and rebate of the commodity tax confer economic benefits on the Japanese exporters of the subject electronic products. Delineating this allegation more specifically in its brief, plaintiff asserts that due to the tax exemption and rebate of the commodity tax, Japanese exporters "have been able to sell in the United States market at a price lower than that at which they can sell in Japan or at a price that would assure a greater profit than could be earned in Japan", and the exporters "have been able to direct their products to new markets".

In its answer, defendant denies that the tax exemption and rebate results in an economic benefit to the Japanese manufacturers, and in its brief argues that "to the extent plaintiff's above-noted contentions have any relevance, plaintiff has failed to produce the necessary

[19] Transcript of press briefing, *op. cit.*, at 3-4, 7.

proof, not to mention demonstrating the absence of a genuine issue of fact between the parties". Defendant's brief also states that plaintiff's contention "assumes that the taxes which are levied directly on the product are not shifted forward to the ultimate consumer, contrary to the long-standing assumptions". According to defendant, "[p]laintiff's view assumes that the producer absorbes [*sic*] some of the tax when he sells at home. When the tax is remitted, according to the plaintiff, the producer need not absorb a portion of the tax and due to this fact may reduce his price (or increase his profit) by the amount of the tax absorbed in the home market".

I have concluded that no triable issue of fact exists in this case. Plainly, when exports are relieved of a domestic consumption tax burden which would otherwise be imposed if the goods were sold in the home market, a bounty or grant, as those terms were construed in *Downs* and *Nicholas,* is bestowed on the exporter as a matter of law. Thus, in *Downs,* the Supreme Court stated (187 U.S. at 513):

> * * * But, if a preference be given to merchandise exported over that sold in the home market, by the remission of an excise tax, the effect would be the same as if all such merchandise were taxed, and a drawback repaid to the manufacturer upon so much as he exported. * * *

And, in *Nicholas,* the Court commented (249 U.S. at 37):

> Looking only at the [countervailing duty] paragraph and judging from the first impressions of its words, the problem presented would seem to be without difficulty. There is paid to an exporter of spirits from the United Kingdom the sum of three or five pence a gallon, as the case may be, and the instant conclusion is that *the sale of spirits to other countries is relieved from a burden that their sale in the United Kingdom must bear. There is a benefit, therefore, in exportation, an inducement to seek the foreign market.* And thus it would seem, if we regarded the substance of things, that the condition of the application of Paragraph E obtains. [Emphasis added.]

Although the Supreme Court has not had occasion to construe the countervailing duty statute since *Downs* and *Nicholas,* the economic and legal rationale of those cases remain viable today. There can be no question but that the rebate or remission of a tax on products exported, where such taxes would have been imposed on a domestic sale in the country of exportation, constitutes a subsidy to the exporter, providing him "an inducement to seek the foreign market". *Nicholas, supra.* And it was precisely such a subsidy that Congress intended should be construed as a bounty or grant subject to the imposition of countervailing duties under our statute.

Further, as noted *supra,* the assumption invoked by the Treasury Department that indirect taxes are fully shifted forward to the ultimate consumer has been shown to be arbitrary and unrealistic.

Hence, in *The United States Submission on Border Tax Adjustments*, February 16, 1966, to Working Party No. 4 of the Council on Border Tax Adjustments, Organization for Economic Co-operation and Development (copy annexed to plaintiff's reply brief as an exhibit), it is noted that indirect taxes do not shift fully forward into the price of products (pages 2–3):

> * * * the imposition of excise taxes and sales taxes are considered to be no different from increases in other kinds of costs. The domestic price of the product is increased to some extent by the tax (although only in exceptional cases such as cigarettes does it verge on an increase equal to the full amount of the tax) and in most cases reduces the quantity of the product demanded in the domestic market. *The price net of tax therefore is lower, and a border tax adjustment involving a full refund of the tax to the exporter makes export sales relatively more profitable than before, thereby acting as an incentive to export the taxed commodity.* [Emphasis added in part.]

Conclusion

For the reasons presented herein, I am clear that as a matter of law the remission of the Japanese commodity tax on the subject electronic products constitutes a bounty or grant under section 303, as amended. Accordingly, I join my distinguished colleagues in granting plaintiff's motion for summary judgment.

Boe, Judge, concurring: I concur in the well-reasoned opinion of Judge Scovel Richardson. In so doing, however, I feel constrained to comment with further particularity on certain contentions of the defendant in support of the negative determination of the Secretary of the Treasury involved in the instant cause of action.

The defendant warns that a determination by this court that the remission of the Japanese commodity tax on the exports in question constitutes a bounty or grant would have a disastrous effect upon the political and economic policies and relationships of this country. In this connection I cannot refrain from observing that the courts are urged with increased frequency to resolve their determinations in the light of prophesied economic or political crises, notwithstanding judicial rationale or statutory construction to the contrary. Indeed, the resolution of any cause of action by a court must necessarily include a consideration of all facts and information which may have an appropriate and relevant bearing on the ultimate determination. However, if a decision of a court shall be predicated on the basis of political and economic expedience and, in so doing, shall ignore judicial precepts and the statutory mandates of the Congress, then assuredly, an erosion of the basic constitutional doctrine of the separation of powers results. The judiciary should not nor cannot serve as the *alter ego* of the Executive or the Congress.

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In seeking affirmation by this court of the administrative determination by the Secretary of the Treasury finding that the remission of the Japanese commodity tax on the merchandise in question destined for exportation to the United States does not constitute a bounty or grant, the defendant appears to rest its argument on two principal contentions:

(1) The legislative history relating to the adoption of the Tariff Acts of 1890, 1894 and 1897 evidences an intent on the part of Congress to exclude the remission of an indirect excise tax by a foreign nation upon exports from the provisions of our countervailing duty statute, and
(2) The omission on the part of Congress to enact legislation altering or repudiating the administrative interpretation of our countervailing duty statute constitutes a legislative approval and sanction of the Treasury Department interpretation.

I

I am unable to concur in the contention of the defendant that the legislative history of the congressional action relating to the Tariff Acts of 1890, 1894 and 1897 serves to reflect the intent of Congress to exclude the remission of an indirect excise tax from the classification of a bounty or grant under our present countervailing duty statute. The remarks by members of Congress while in floor debate, referred to in defendant's briefs, give scant legal justification to the administrative interpretation adopted and presently urged by the Treasury Department. The colloquy engaged in by the members of Congress rather would appear to emphasize the dubious familiarity and understanding on their part with respect not only to the provisions of the German Sugar Act in question, but the specific legislation under their immediate consideration. To adopt an interpretation of our countervailing duty statute upon a presumed legislative intent predicated upon the apparent limited and conflicting understanding evidenced by statements then made by some of the members of Congress, indeed, would do violence to the rules of statutory construction.

No more clear, concise or unambiguous definition of the terms "bounty" or "grant," first included in the countervailing duty provisions of the Tariff Act of 1897 and in all subsequent countervailing duty statutes enacted thereafter, can be given than the meaning expressed by the Court in *Downs* v. *United States*, 187 U.S. 496 (1903) at 515:

> When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation.

In like manner, the Court therein has clearly indicated that in construing what may constitute a "bounty" or "grant," no distinction lies between a direct and an indirect tax, nor that a distinction lies between a remission of a tax and a direct payment or subsidy (at 502):

> *A bounty may be direct*, as where a certain amount is paid upon the production or exportation of particular articles, of which the act of Congress of 1890, allowing a bounty upon the production of sugar, and Rev. Stat. sections 3015–3027, allowing a drawback upon certain articles exported, are examples; *or indirect, by the remission of taxes* upon the exportation of articles which are subjected to a tax when sold or consumed in the country of their production, of which our laws, permitting distillers of spirits to export the same without payment of an internal revenue tax or other burden, is an example. *United States* v. *Passavant*, 169 U.S. 16. [Emphasis supplied.]

The import of the foregoing quotations cannot be disclaimed by terming the same to be dicta.

The defendant, however, further urges that the term "net amount" of a bounty, as first used in the Tariff Act of 1897 and thereafter in all subsequent countervailing duty statutes, must be construed conceptually and in point of time with the provisions of the prior Tariff Acts of 1890 and 1894. This contention likewise is based principally upon the exchange between the members of the Congress in floor debates and discussions with respect to the prior Tariff Acts of 1890 and 1894 as well as the Tariff Act of 1897 then under consideration, and the respective relationship of these acts to sugar acts of foreign nations, principally Germany. From this premise the government contends that the term "net amount," *per se*, excludes the remission of a nonexcessive excise tax from the purview of our countervailing duty statute. No explanation or legislative intent other than the hypothesis of the defendant appears to have been offered with respect to the term "net amount," first incorporated as a part of the countervailing duty provision of the Tariff Act of 1897 and included all countervailing duty statutes enacted subsequent thereto.

The intent of the Congress in the use of the term "net amount" may be understood more readily when viewed in the light of the economic and legislative history relating to the German sugar industry during the last decade of the nineteenth century. Throughout this period sugar exports increased greatly, occasioned in large measure by the payment of government bounties. Accordingly, complicated mechanisms to control the bounties paid to sugar exporters on the one hand and to alleviate the resulting economic burden thrust upon the domestic consumer were initiated, modified and amended by successive German tax laws.[1]

[1] In 1894 and 1895, sugar exports were reported to have constituted 72% of the total German production. In a single year more than $30,000,000 was paid as bounties to sugar exporters from German internal sugar tax revenues totaling more than $40,000,000. German internal revenue taxes were amended or new taxes enacted in 1887, 1892, 1893, and 1896. *Reciprocity*, J. Laurence Laughlin, Ph. D. and H. Parker Willis, Ph. D. (New York: The Baker & Taylor Co., 1903).

A reoccurring burden necessarily fell upon the Congress to enact legislation providing for countervailing duties at specific rates to "keep pace" with the rapidly changing German tax laws and procedures and the fluctuating bounties occasioned thereby. The need for a countervailing duty statute unrestricted by a specific percentage amount and sufficiently elastic in determination to effect the regulation of any exports from any foreign country was clearly evident.

The Tariff Act of 1897 provided the first countervailing duty provisions of general application. This statute is characterized by a language far more broad and inclusive than the language contained in the Tariff Act of 1890 and 1894 in which the countervailing duty provisions were directed solely to sugar exported from countries which continued, in turn, to enact involved and intricate tax mechanisms in connection with their domestic production and consumption of this commodity as contrasted with the exportation thereof. The Act expanded the scope of the Tariff Act of 1894 by specifically deleting the provision of that Act which limited the application of the statute to excessive tax remissions only. As Judge Richardson appropriately noted in *American Express Company* v. *United States*, 67 Cust. Ct. 141, 150–151, C.D. 4266, *aff'd on other grounds*, 60 CCPA 86, C.A.D. 1087, 472 F. 2d 1050 (1973):

> [W]ith the advent of the decision of the Supreme Court in *Downs*, it is clear that if Congress had wanted to nullify the effect of the decision in that case it could easily have done so through reenactment of a successor provision to section 5 of the 1897 Tariff Act (or amended the statute) that expressly excluded tax remissions from its ambit, akin to its treatment of that subject in paragraph 182½ of the 1894 Tariff Act. The fact that Congress has never done so is, in our opinion, indicative that it approves of the holding in *Downs*, by reason of which, that case represents the law on the subject of tax remissions to date insofar as the question of "bounties" is concerned.

The Congress also chose to include such meaningful terms and phrases in the Tariff Act of 1897 as:

> "pay or bestow," "directly or indirectly," "any bounty or grant," "net amount of such bounty or grant," "however the same be paid or bestowed" and "[t]he net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury * * *."

The inclusion of these terms as well as the significance of their inclusion has been noted by the Supreme Court. In its consideration of the aforequoted language and in answer to the argument of petitioner's counsel therein, which closely parallels the contentions now urged by the defendant in this proceeding, the Court in the case of *Nicholas & Co.* v. *United States*, 249 U.S. 34 (1919), at 38–39 stated:

In further support of their distinctions *counsel cite the executive practice of this country, and adduce the decisions of this and other courts to show that such practice is a useful resolvent of the meaning of words and of legislative intention.*

We appreciate the strength of the argument, but the circumstances are but aids to persuasion; they do not compel it. Every new statute is individual and presents its own problem. *That before us does, and, as we have said, looking at its words alone, has no uncertainty of purpose.* Whenever any country "shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise," there shall be levied and paid upon it, upon importation, in addition to the regular duty, an additional one "equal to the net amount of such bounty or grant, however the same be paid or bestowed." The statute was addressed to a condition, and its words must be considered as intending to define it, and all of them—"grant" as well as "bounty"—must be given effect. If the word "bounty" has a limited sense, the word "grant" has not. A word of broader significance than "grant" could not have been used. Like its synonyms "give" and "bestow," it expresses a concession, the conferring of something by one person upon another. And if the "something" be conferred by a country "upon the exportation of any article or merchandise," a countervailing duty is required by Paragraph E. [Emphasis supplied.]

The absence of a specific reference to the words "net amount" in prior decisions does not justify the application of an esoteric meaning to the term. The word "net" as used therein should be given no other connotation than its ordinary meaning. *American Customs Brokg. Co., Inc., a/c Hamakua Mill Co.* v. *United States*, 58 CCPA 45, 433 F. 2d 1340 (1970). The use of the word "net" permits the application of the statute with equal facility in the determination of the amount of a bounty paid under differing laws of any foreign nation. Thus, in ascertaining the "net amount" of a bounty or grant, the opportunity exists to consider whether a bounty may have been paid either in full or in part or whether the bounty in question may have been offset in full or in part by other charges consistent with the law of the foreign nation from which the exports have been received. In short, the term "net" has been used to afford the Secretary of the Treasury a criterion to determine the appropriate amount of a countervailing duty which may be applied to the respective exports which have been the beneficiary of differing bounties of any foreign nation. Clearly, however, the criterion used to determine the proper amount of a countervailing duty includes both nonexcessive and excessive tax remissions. Accordingly, when it has been determined that a bounty or grant has been paid by a foreign nation upon its exports, the duty and responsibility of the Secretary of the Treasury lies only and solely in the power delegated to him by the Congress to determine the "net amount" thereof.

In light of the foregoing, the construction and interpretation urged by the defendant cannot be accepted by this court.

II

If, as the defendant contends, a long-standing administrative interpretation of the countervailing duty statute should alone dictate the presently accepted legal construction thereof, then, indeed, judicial review becomes a mockery. It is acknowledged that, "[t]he interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute, *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 421 (1973); *Columbia Broadcasting System, Inc.* v. *Democratic Comm.*, 412 U.S. 94, 121 (1973) * * * ." *Youakim et al.* v. *Miller*, 425 U.S. 231, 235–236 (1976). However, it must also be acknowledged that in the construction of a statute an "expressly articulated position" should be adopted at the administrative level. *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971). Where it appears that the statutory interpretation by a department or agency is in error, judicial approbation should not be given. In the recent case of *Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86, 94–95 (1973), the United States Supreme Court clearly recognized this limitation upon the independent exercise of administrative statutory construction:

> The Commission's more recent interpretation of the statute in the guideline relied on by the District Court is no doubt entitled to great deference, *Griggs* v. *Duke Power Co.*, *supra*, at 434; *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring), but that deference must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question. Courts need not defer to an administrative construction of a statute where there are "compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); see also *Zuber* v. *Allen*, 396 U.S. 168, 193 (1969); *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 272 (1968).

The defendant has urged that ambiguity in the countervailing duty statute justifies the acceptance of the long-standing interpretation applied by the Secretary of the Treasury.[2] A careful examination of

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[2] The present interpretation urged by the defendant is contrary to the interpretation offered by the defendant in its briefs to the Supreme Court in the *Downs* and *Nicholas* cases. The position of the government therein is reflected by the following statement:

> Furthermore, if a foreign government should object to our drawbacks or remission of internal taxes as unduly encouraging our export trade to that government's detriment, in its own markets, and as amounting in practical effect to an indirect bounty, we might successfully urge our diplomatic resistance to that view, but I can not see that we should have conclusive legal ground for resisting simply because it was an ordinary tax remission or drawback in our municipal system. * * *
>
> * * * For it seems that any special favor, benefit, advantage, or inducement conferred by the Government, even if it is given as a release from burden and is not a direct charge upon the Treasury, is fairly included in the idea and meaning of an indirect bounty. [Brief for The United States, in The Supreme Court of the United States, October Term 1902, on Writ of Certiorari, *Downs* v. *United States*, No. 318 at 23-24, 25.]

the countervailing duty provisions contained in the original Act of 1897 and reenacted in all subsequent countervailing duty statutes neither reflects the ambiguity alleged by the defendant nor sustains the "reasonability" of the interpretation adhered to by the Secretary of the Treasury. Particularly, is this true in light of the clear construction of the statute and the specific terms "bounty" and "grant" contained therein by the Supreme Court in the cases of *Downs* v. *United States*, 187 U.S. 496 (1903) and *Nicholas & Co.* v. *United States*, *supra*.

What then is the real question before us in this proceeding? To no extent can it be said that the issue is limited to a question involving a recognized right of a governmental department to interpret a statute, the provisions of which it is charged to enforce. Rather, the basic question before us is whether the Secretary of the Treasury shall have the right and be permitted to continue to interpret the provisions of our countervailing duty statute contrary to its explicit and unambiguous language and contrary to the interpretation and construction previously placed thereon by the highest Court of our land. The answer can only be, no.

In the Trade Act of 1974 (19 U.S.C., sec. 2101), under which statute we are guided in this action, Congress has laid to rest with finality any question as to its intent with respect to the construction of the countervailing duty statute. In section 331 thereof, amending sections 303 and 516 of the Tariff Act of 1930 (19 U.S.C., secs. 1303, 1516), substantially the same language contained in prior countervailing duty statutes has again been incorporated. However, it will be noted that in section 303(d), the Congress affirmatively has recognized the very international economic and political problems, which the defendant in this action has directed to the attention of this court. To these problems the Congress has responded. In so doing, the Congress:

> 1. Underscores its desire and objective that the President "* * * seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties." (19 U.S.C., sec. 1303(d)(1).)
>
> 2. In keeping with this objective, the Congress does not require the imposition of the countervailing duty provisions for a period of four (4) years from the date of the enactment of the Trade Act if:
>
> a. The Secretary of the Treasury determines adequate steps have been taken to reduce substantially or eliminate the adverse effect of a bounty or grant, and that
>
> b. a reasonable prospect exists that successful trade agreements will be entered into reducing or eliminating the trade barriers in question, and

c. imposition of the additional countervailing duty would be likely to seriously jeopardize the completion of such negotiations.[3]

Any decision not to impose the appropriate countervailing duty of the Secretary of the Treasury pursuant to the foregoing delegated authority is required to be reported to the Congress, either body of which may disapprove the decision of the Secretary, thereby restoring the immediate and full application of the countervailing duty provisions.[4]

From the foregoing, it is clear that the Congress has reaffirmed not only to the executive branch of this government, but to all nations, its approval of the judicial construction placed upon the countervailing duty statutes of the United States. At the same time, however, a procedure is provided to assist in the resolution of international problems relating to bounties, grants and subsidies through negotiation and the establishment of internationally agreed rules.[5]

Many of the issues and the facts relating thereto which have been presented to this court were likewise presented to the Congress at the time of its consideration of the Trade Act of 1974. Had the Congress intended to exclude the remission and/or exemption of a nonexcessivs excisetax from the classification of a bounty or grant, it could ande would have done so. It has chosen not to so do, but rather to open the door to discussion and negotiation among the nations. To construe our recently enacted countervailing duty statute in conformity with the interpretation urged by the defendant not only would disregard the statutory intent of the Congress, but would thwart the very objective it seeks to attain through negotiation and agreement.

[3] 19 U.S.C., sec. 1303(d)(2)(A)(B)(C).

[4] 19 U.S.C., sec. 1303(e)(1)(2).

[5] The report of the Committee on Ways and Means, House of Representatives, in the consideration of this legislation is illustrative of the realization by the Congress of the need to provide discretionary authority on the part of the Secretary of the Treasury to withhold the application of the countervailing duty provisions if the same may prove counterproductive during the course of negotiations.

The 4-year temporary discretionary authority was accorded because of the very real danger that the mandatory provisions of section 303, combined with the committee's amendment providing for a 12-month time limit for action under this section, could compel the Secretary to take actions which might well frustrate the successful outcome of the forthcoming negotiations. The committee is aware that there are differences of opinion internationally as to what constitute permissible and nonpermissible export assists under international law and practice, and that the negotiation of an agreement on this issue may prove difficult. *The committee has no desire to sanction certain existing export-assist practices conducted by various foreign governments.* It also recognizes that the United States itself may well be conducting programs of export-assists which foreign governments may find inconsistent with international law and policy.

With this background, the Secretary of the Treasury must be temporarily accorded some degree of latitude in administering section 303 until an international agreement is reached regarding the international practices which would be considered permissible and nonpermissible. Otherwise the Secretary of the Treasury may conceivably be constrained to take countervailing action under section 303 against a practice which ultimately may be internationally agreed to be a permissible international export assist. The discretionary authority accorded herein has been restricted to 4 years to facilitate the international negotiations. It has been accorded on the understanding that the U.S. negotiators will report regularly to the Congress on the progress and ultimately on the outcome of the negotiations with respect to international export assists. *The committee assumes that it may be necessary to further amend section 303 depending upon the outcome of these negotiations, assuming that they terminate in an agreement acceptable to the United States.* [Emphasis supplied.] [H.R. 10710, House Committee on Ways and Means, House Report No. 93-571, 93d Cong., 1st Sess., October 10, 1973, at 75-76.]

It having been determined in the proceeding that the remission of the Japanese commodity tax upon the electronic products which are the subject of this action constitutes a bounty or grant under our present countervailing duty statute (19 U.S.C., sec. 1303), the instant action, accordingly, should be remanded to the Secretary of the Treasury to determine and assess an additional duty equal to the net amount of the bounty or grant bestowed upon such products exported from Japan and entered into the United States from and after the entry of judgment herein.

ORDER

Upon reading and filing plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment, and upon all other papers and proceedings had herein, it is hereby

ORDERED that plaintiff's motion for summary judgment be, and the same is granted, and it is further

ORDERED that defendant's cross-motion for summary judgment be, and the same is, denied.

ADJUDGED AND DECREED that the exemption, under the Commodity Tax Law of Japan, of television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes (hereinafter "subject electronic products") from a commodity tax, when exported from Japan, or the refund of such tax on the exportation from Japan of the subject electronic products, constitutes the payment or bestowal of a net bounty or grant within the embrace of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. § 1303); and

The Secretary of the Treasury is hereby directed to ascertain and determine or estimate the net amounts of the bounty or grant paid or bestowed on the exportation of the subject electronic products from Japan and to order the appropriate customs officers throughout the United States to assess countervailing duties, in said net amounts equal to the said bounty or grant, on the subject electronic products exported from Japan, entered or withdrawn from warehouse for consumption on or after the day following the date of entry of this Order.

SCOVEL RICHARDSON
J.

BERNARD NEWMAN
J.

NILS A. BOE
J.

Dated: New York, New York
April 12, 1977.

(C.D. 4692)

McDONNELL DOUGLAS CORP. *v.* UNITED STATES

DC–9 Airplane

AMERICAN GOODS RETURNED—IMPROVEMENT IN CONDITION—VOLUNTARY ENTRY

Where on rehearing in an action in which the importer sought to establish a duty-free entry for the American-made components of an imported DC–9 airplane notwithstanding its noncompliance with applicable customs regulations the evidence establishes (1) that the district director had not *refused* to permit entry of the aircraft in issue under TSUS item 800.00 as claimed by the importer but had given an opinion solicited by the importer's customs broker to the effect that the aircraft would be treated as a fully dutiable importation and the importer had elected to make a dutiable entry of the aircraft on the basis of such administrative opinion, and (2) that the returned airplane appears to have been modified while in service in a foreign country so as to be advanced in value or improved in condition upon its return to the United States, *held*, there is no basis in the record in law or in fact to warrant disturbing the decision and judgment entered in the case which overruled the importer's claim for duty-free entry under item 800.00.

Court No. 72–6–01395

Port of Los Angeles

[Decision and judgment to stand.]

(Decided on rehearing [C.D. 4604] April 15, 1977)

Louis Lieber, Jr. and *B. David Freundlich*, attorneys for the plaintiff.
Glad, Tuttle & White (*Edward N. Glad* of counsel), co-attorneys for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Bernard J. Babb*, trial attorney), for the defendant.

RICHARDSON, Judge: This action is before the court on rehearing following a decision and judgment rendered July 22, 1975, in C.D. 4604 (75 Cust. Ct. 6) wherein the court held, among other things, that the plaintiff-importer had failed to establish under its first cause of action entitlement to duty-free treatment in accordance with TSUS item 800.00 for the American-made components of the imported DC–9 airplane involved in the case. The court's decision in this regard was predicated upon both procedural and substantive considerations.

On November 10, 1975, and at the instance of plaintiff, the court granted a rehearing in the case for the purpose of enabling plaintiff to introduce into the record (1) evidence to the effect that plaintiff's

failure to comply with the requisite customs regulations governing item 800.00 classification was due to no fault on its part, and in addition, (2) evidence that would satisfy such regulations. On the basis of the testimony and other evidence introduced into the record during rehearing the court is of the opinion that plaintiff's failure to comply with the customs regulations relative to an item 800.00 classification was *self-induced.*

There is no question but that plaintiff made no effort to enter the involved airplane under item 800.00. Its posture here is that this particular airplane was but one of a number of aircraft returned to plaintiff after service abroad, and that after the customs service *refused* to permit partial free entry of the first of such returned aircraft, attempts on plaintiff's part in making partial free entry of the remaining aircraft in this category was rendered futile.

However, the record as developed on rehearing shows that even with respect to the first of such returned aircraft plaintiff did not tender to customs the requisite entry and supporting documents for item 800.00 treatment of that airplane, although apparently primed to do so. In this connection William H. Holmes, a customs broker in the employ of the firm of Guy B. Barham, plaintiff's broker in these transactions, testified in response to a question put to him by the court during rehearing (R. 39–40):

> JUDGE RICHARDSON: And the first one – they would not consider it as American Goods Returned?
>
> MR. HOLMES: *When I originally approached Customs,* as to how this aircraft was coming in – they told me to enter it as American Goods Returned, paying the duty on items of foreign origin, which had not been previously duty paid and I prepared our delivery permit, and obtained release of the aircraft on the position of American Goods Returned, and payment of the duty on the items of foreign manufacture, which had not been previously duty paid. And after the release of the aircraft, *we were advised by Customs,* that they had changed their mind, and that we would have to – *it was their opinion* that we would have to pay duty on the full value of the aircraft. However, they were submitting this to Washington for the Bureau of Customs to make a decision.
>
> In the meantime, we were unable to prepare any type of an entry, pending this decision, and as it was brought out, we had a late filing of this entry, pending this decision. The decision that came from Washington was that we would have to pay duty on the full value of the aircraft and that all future aircraft would have to be entered on the same basis, with full payment of the duty And, *based on that,* there was no need to file these other documents to establish American origin because Customs had refused to enter this as an aircraft of American origin, even though the major value of this aircraft is of American origin and manufacture – there are certain items imported from Canada, and other foreign

> countries, under bond, and those items, which had not been duty paid, we felt should be duty paid, and we felt we had owed. We offered to pay that duty, and Customs said – no – we want full duty on all parts of American origin, and *based on that*, we could not file any future entries on aircraft except to duty pay them. [Emphasis added.]

Thus, it clearly appears from the testimony of the witness Holmes that the customs service had never *refused* to accept any entry tendered on plaintiff's behalf which looked toward entry of this aircraft under item 800.00. On the contrary, the record shows that at the solicitation of the broker the district director had given the broker an *opinion* to the effect that the aircraft would be treated as fully dutiable—a position that was subsequently backed up by the Customs Bureau in Washington, D.C. to whom the question had been referred by the district director for a determination. However, the decision not to make a duty-free entry was entirely that of the plaintiff, albeit made in the light of adverse administrative opinions. Had plaintiff filed the proper documents, made timely protests, been denied and appealed to the Customs Court, the case would not be vulnerable to the technical jurisdictional questions raised by the defendant.

Moreover, even if late filing of the requisite documentation supporting an item 800.00 classification be now permitted under the circumstances of this case, plaintiff has not addressed itself to the substantive aspect of the case. The district director has not indicated at any time that he would be inclined to grant item 800.00 treatment to the aircraft in issue but for the absence of the requisite documentation. And in this court plaintiff had not sought on rehearing to establish that the involved airplane was returned to this country *without advancement in value* or *improvement in condition*.

If anything, the record on rehearing establishes that the aircraft in issue underwent some kind of modification while in foreign service.* Exhibit 10 (foreign shipper's declaration) introduced into the record on rehearing indicates that its galleys and tire recaps, among other things, are of foreign manufacture. This information tends to coincide with the notations "Timmons galleys" and "Swiss Recaps on AGR Rubber" written on the pro forma invoice by the customs supervising inspector on September 8, 1968, at the time the aircraft was examined and released, as if to identify at that time construction in and articles on the aircraft of foreign origin.

Although tire recaps do not, in the court's view constitute an improvement in condition over the original new tires, the installation of galleys in an airplane's fuselage is a different matter. The construc-

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* Mr. Needle testified at the initial session that when the aircraft was returned to plaintiff the original seats had been removed and other American-made seats had been brought back on it as cargo.

tion of galleys in an American-made airplane in a foreign country constitutes an *advancement in value* or *improvement in condition* of that plane for use in the foreign country such as would prevent duty-free reentry of the plane into the United States. *Air Carrier Supply Corp. et al.* v. *United States*, 44 CCPA 116, 119, C.A.D. 647 (1957). And while in the instant case plaintiff has undertaken on rehearing to present evidence to overcome procedural difficulties encountered in the case, it seeks affirmative relief without, however, meeting the substantive deficiencies in the case which have been highlighted by the evidence adduced on rehearing.

For the reasons stated the court finds that the decision and judgment heretofore entered in the case are in all respects proper and correct on the evidence and the law, and as such, will not be disturbed.

(C.D. 4693)

THE DE LAVAL SEPARATOR COMPANY *v.* UNITED STATES

On-farm bulk milk tanks

Farm milk tanks imported without refrigeration units, which are domestically supplied and attached at the farm, were classified under item 661.35, Tariff Schedules of the United States, as "refrigerators and refrigerating equipment * * *" and assessed with duty at 6 percent ad valorem *held* properly entitled to entry free of duty under item 666.00, Tariff Schedules of the United States.

The legislative intent of Congress in enacting subpart A, schedule 6, part 4, is evidenced by the title assigned to said provision which reads: "Boilers, Non-Electric Motors and Engines, and Other General Purpose Machinery."

The intent as indicated by the heading is not overcome by statements in the Explanatory Notes to the Brussels Nomenclature or the Tariff Classification Study. *Great Western Sugar Co. et al.* v. *United States*, 59 CCPA 56, C.A.D. 1038, 452 F. 2d 1394 (1972).

Farm tanks imported without refrigeration units are not unfinished refrigerators as the component missing is both substantial and essential. *Authentic Furniture Products, Inc.* v. *United States*, 61 CCPA 5, C.A.D. 1109, 486 F. 2d 1062 (1973).

Said tanks are not parts of refrigerators since both provisions of item 660.00 *supra* claimed by plaintiff, while generic, are sufficiently specific designations as to prevent classification as parts under General Interpretative Rule 10(ij). *Robert Bosch Corp. et al.* v. *United States*, 63 Cust. Ct. 187, C.D. 3895, 305 F. Supp. 921 (1969).

Court No. 72-6-01352

Port of Buffalo

[Judgment for plaintiff.]

(Decided April 15, 1977)

Rode & Qualey (*John S. Rode* and *Michael S. O'Rourke* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Steven P. Florsheim*, trial attorney), for the defendant.

FORD, Judge: This action presents for determination the proper classification of certain merchandise described on the invoice as "FARM TANKS WITHOUT REFRIGERATION UNITS." They were classified by Customs under item 661.35 TSUS as "refrigerators and refrigerating equipment, whether or not electric, and parts thereof" and consequently assessed with duty at 6 per centum ad valorem.

Plaintiff contends said merchandise is entitled to entry free of duty under item 666.00 TSUS which provides for "* * * on-farm equipment for the handling * * * of agricultural * * * products, and agricultural * * * implements not specially provided for, and parts of any of the foregoing."

The involved tanks in their condition as imported are made of stainless steel. They are oval or cylindrical in shape and have double wall construction with thermal insulation between the walls. In addition, said tanks have a manhole, agitator, graduated dipstick, vent, inlet and outlet connection, built-in thermometer, refrigeration and electrical control panels and a washing spray ball. This unit when connected to a refrigeration unit and a source of electricity is capable of storing and cooling milk in accordance with 3–A Sanitary Standards formulated by the International Association of Milk, Food and Environmental Sanitarians, the U.S. Public Health Service and the Dairy Industry Committee.

The pertinent statutory provisions involved herein provide as follows:

Tariff Schedules of the United States:

* * * * * * *

Schedule 6, part 4, headnote 2:

* * * * * * *

> 2. Unless the context requires otherwise, and subject to headnote 1 to subpart A of this part, a multi-purpose machine is classifiable according to its principal purpose * * *.

* * * * * * *

> Subpart A. – Boilers, Non-Electric Motors and Engines, and Other General Purpose Machinery

Subpart A headnote:

> 1. A machine or appliance which is described in this subpart and also is described elsewhere in this part is classifiable in this subpart.

* * * * * * *

661.35	Refrigerators and refrigerating equipment, whether or not electric, and parts thereof	6% ad val. [as modified by T.D. 68-9]

* * * * * * *

Subpart C headnote:

1. The provisions of item 666.00 for "agricultural and horticultural implements not specially provided for" do not apply to any of the articles provided for in schedule 6, part 2, part 3 (subparts A through F, inclusive), part 5 (except item 688.40), or part 6, or to any of the articles specially provided for elsewhere in the tariff schedules * * *

666.00	Machinery for soil preparation and cultivation, agricultural drills and planters, fertilizer spreaders, harvesting and threshing machinery, hay or grass mowers (except lawn mowers), farm wagons and carts, milking machines, on-farm equipment for the handling or drying of agricultural or horticultural products, and agricultural and horticultural implements not specially provided for, and parts of any of the foregoing	Free

The record consists of the testimony of three witnesses called by plaintiff and two on behalf of defendant. Plaintiff introduced and there were received 25 exhibits and defendant presented one exhibit.

The first witness called on behalf of plaintiff was William F. Crook, a former employee of the importer. His last position with the firm was that of product manager which included total responsibility for marketing of the bulk milk container on a national basis. The witness indicated that the invoice designations described the merchandise involved. The designation with the letter "E", a numeral designation, and an initial such as "ROB" are indicative of the characteristics of the tank. The letter "E" indicates that the item was for export. The numerical designation indicates the nominal capacity of the tank, the letter "R" indicates remote installation of the condensing unit at the farm, the letter "O" the configuration of the tank, to wit, oval, and the letter "B" designates the tank being of a bulkhead nature in that a portion of the tank would project outward from the milk room.

The witness identified plaintiff's exhibit 1 as sales literature prepared for the plaintiff under his supervision which portrays the merchandise in question. Plaintiff's exhibits 2 through 17 contain

various photographs of the bulk milk tanks, accessories and the Tecumseh condensing unit which is added after importation. The witness indicated that if a farmer orders a bulk milk tank he would not receive the condensing unit which is considered a separate entity and is billed to the dealer as a separate item. It is not part of the tank.

Mr. Crook then testified that the metallic portion of the tank is 300-series stainless steel containing polyurethane foam in the areas between the two walls of the tank. The polyurethane is found in varying thicknesses around the tank to provide thermal insulation. The witness has visited various dairy farms throughout the United States and observed the use of bulk tanks manufactured by the exporter, as well as others. They have on many occasions been used with or in conjunction with other items of equipment such as those designated on plaintiff's exhibit 19 which is a representation of a milking parlor. Based upon his association with plaintiff, Mr. Crook testified that approximately 5,000 farm bulk milk tanks were imported by his firm. He has seen bulk tanks used on dairy farms in all major milk producing states, such as the New England States, New York, Pennsylvania, Wisconsin, Michigan, Ohio, Minnesota, California and Idaho. He has never seen bulk tanks utilized other than on dairy farms. The witness then testified that the tanks imported by the De Laval Separator Company range ir size from 320 United States gallons to 2,500 United States gallons.

On cross-examination, Mr. Crook stated that when milk leaves the cow's udder it is "around 100 degrees" Fahrenheit, and it enters the bulk milk tank at about 90 degrees. When it is picked up by the tank truck it is in the "40-degree range." The bulk milk tank will not function and operate for the purpose for which it was intended without a condensing unit. The witness further stated that the thermal insulation helps maintain the milk in a cool state as long as possible. The condenser unit consists of a motor compressor assembly, a condenser, a receiver, and the necessary electrical wiring. The washer unit is required under the standards for bulk milk tanks. The agitator and agitator drive operates by a thermostat in conjunction with the condensing unit. The agitator moves the milk across the bottom of the tank and prevents freezing when the unit is operating. In addition, it assists in uniform cooling of the milk. In its condition as imported, the tank includes a thermometer which indicates the temperature of the milk in the tank.

The control box pictured in plaintiff's exhibit 5 contains an expansion valve which controls the refrigerant flow into the evaporator.

On redirect examination Mr. Crook testified that cooling is only one function of the bulk farm tank. The tanks must be constructed in accordance with the 3–A standards which outline the quality of construction, the materials, and certain hygienic factors. It is mandated

that the tanks use stainless steel which is not ideal from a cooling standpoint but is necessary because of the sanitary conditions which require the material to be "impervious," readily cleanable to a sanitary condition, and to prohibit the introduction of any foreign substance into the milk. The gasket surrounding the manhole cover is to prevent the entrance of dust, airborne particles, and insects, none of which affect the cooling of the milk. The witness also testified that the spray ball used to wash the tank does not have any effect on the cooling of the tank. The agitator according to the witness, in addition to preventing the freezing of the milk while the compressor is in operation, also assists in maintaining a homogeneous mixture during the time it is in storage. The agitator functions both while the compressor is in operation and when it is not in operation.

On re-cross-examination Mr. Crook admitted that there are a number of refrigeration systems whose function is solely for storage, such as walk-in coolers and cabinet refrigerators in a supermarket.

On redirect examination Mr. Crook identified the 3–A standards which cover the bulk milk tanks on pages 172 through 178. The standards book was received in evidence as plaintiff's exhibit 20.

Plaintiff's second witness, Mr. Richard Guest, a licensed mechanical engineer in the State of Pennsylvania, has a bachelor of science and a master of science degree from North Dakota State University and is presently employed by Cornell University as an extension specialist in materials handling and farmstead mechanics. His present job requires continuous contact with dairy farmers of New York State. He has visited dairy farms in most all the major milk producing states. The function of his present job is to disseminate knowledge obtained from research to the farmers. He is familiar with the production of milk on dairy farms and with bulk tanks in particular. The primary purpose of the milking system is the production of quality milk and this involves three major phases. These phases are the harvesting, handling and storage of the crop. By the use of plaintiff's exhibit 19, the witness described these three phases. According to the witness, the milking part is the harvesting. The transfer of the milk through the lines to the bulk tank constitutes the handling and storage of the milk.

Mr. Guest then testified as to the factors involved in the design of a system involving milk production. The 3–A standards, according to Mr. Guest, are set up as the requirements for such tanks. The use of stainless steel and glass is for the purpose of "cleanability" and visual inspection of the milking systems. In addition, the tank should be relatively tight to prevent the ingress of foreign materials.

According to witness Guest, the farmer's milk is picked up daily or every other day by a bulk over-the-road tanker. The farmer is paid for his product based upon weight which is calculated by means

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of a chart individually calibrated to the farmer's farm bulk milk tank and on its butterfat content. There are several major problems a farmer faces in storing milk. One of the problems is the leveling of the tank and the ability to maintain its level so as to permit an accurate reading on the measuring stick. Other problems involve the ability to clean the tank and the necessity to agitate the milk to prevent stratification of temperature as well as to insure the uniformity of the product. The stratification, according to the witness, is the difference in temperature between the bottom and top of the milk in the storage tank while the uniformity relates to the necessity of keeping the milk in a homogeneous state. The latter is necessary to maintain a uniform butterfat mixture.

On cross-examination Mr. Guest testified that the farmer must be a "clean producer." To accomplish this, he must prevent the entrance of sediment as well as having a low bacteria count which is a reflection of the state of health of his cows, and in addition, must preserve the milk by cooling until it is picked up. Witness Guest further stated that a freeze-up could occur if the evaporator was working and the agitator was not. He further emphasized the use of the agitator as being necessary to maintain a uniform butterfat mixture since there is inherent difficulty in remedying a situation once the butterfat has been allowed to separate out. While admitting that the tank does perform a cooling function he was of the opinion that the merchandise before the court was not capable of performing as a cooling system since it did not contain a condensing unit.

On redirect examination the witness summarized the functions of his farm bulk milk tank which include storage, the ability to provide an accurate reading of volume, agitation and the ability to clean the tank. The accurate reading of volume is of utmost importance since the farmer is paid for his milk by weight and butterfat content. In the opinion of Mr. Guest the bulk tanks involved are used for storage and handling of the product.

The next witness called on behalf of plaintiff was Mr. Sam P. Soling, president of St. Onge, Ruff & Associates, Inc., a consulting engineering firm specializing in food industry refrigeration. Mr. Soling is a licensed engineer in five states and has a master of science degree as well as a bachelor of mechanical engineering. His previous employment consisted of being an instructor in mechanical engineering at Stevens Institute of Technology, an industrial engineer, as well as chief engineer of refrigeration for the York Corporation. He is a member of the American Society of Mechanical Engineers and a fellow of the American Society of Heating, Refrigerating and Air Conditioning Engineers. As a member of the latter he served as chairman of the guide and data book committee which prepares the

Refrigeration Guide and Data Book. Mr. Soling is familiar with farm tanks, similar to the tanks involved herein. With the use of exhibit 21, a schematic drawing of a refrigeration cycle, which was prepared under his direction and supervision, he explained the operation of a refrigeration cycle. In explanation of the symbols contained on exhibit 21, Mr. Soling testified that the letter "L" on the diagram stands for liquid and has been coded in the color green. The letter "V" stands for vapor and is colored red.

According to the witness, a refrigeration cycle utilizes a refrigerant and a compressor to reduce the pressure at which point the refrigerant can boil in the evaporator. This permits the temperature to be lowered sufficiently so that the medium being cooled can cause a flow of heat from the evaporator into the refrigerant. In this manner the pressure of the refrigerant is raised to permit it to condense at a temperature higher than the condensing medium. The effect is a heat pump to remove heat from an evaporator and reject that heat into the atmosphere.

Utilizing exhibit 21, the witness described the operation of the refrigeration cycle starting at the compressor which is the heart of the cycle. The compressor pulls vapor away from the evaporator fast enough to produce a low pressure and a low temperature which causes heat to flow. It is then compressed flowing up, as indicated by the arrows, to the condenser. The condenser is a piece of heat transfer equipment where the vapors flow inside the tube and air is circulated over the outside of the tube in order to condense the refrigerant which enters as vapor and leaves as a liquid. As the liquid leaves the condenser it flows to a receiver which is a part of the system to store up refrigerant so that, when needed, it is available to be put into the evaporator. The liquid leaving the condenser goes to the receiver and then through a filter which is an element used to remove any tiny particles of dirt to avoid clogging the parts of the control elements. As it leaves the filter it goes to a solenoid valve which is electrically operated to open or close on demand to prevent or permit the flow of the refrigerant. Following the solenoid is a bull's-eye or sight glass which is a means of indicating whether you have sufficient flow of liquid in the liquid line. The liquid then proceeds through a thermal expansion valve which controls the flow of the liquid refrigerant to the evaporator. The cycle continues to the evaporator where heat transfer takes place. On a cold refrigeration cycle the liquid changes to a vapor and accordingly this item derives its name, evaporator. The flow then continues to the feeler bulb on the suction line. The function of this item is to preserve a fine balance between getting sufficient liquid into the evaporator but not an overabundance which would come back to the compressor.

After viewing various photographic exhibits of the imported merchandise, Mr. Soling stated that the receiver compressor and condenser were not present in said exhibits and that such items are necessary for any closed circuit refrigeration cycle.

The witness further indicated, based upon his experience, that he had never seen bulk farm tanks, such as the merchandise before the court, used in commercial food processing applications.

On cross-examination Mr. Soling stated that a closed refrigeration cycle could function without a filter, solenoid valve, bull's-eye, or thermal expansion valve provided the latter was replaced with another type of expansion valve. Mr. Soling then stated that you must have a compressor, condenser, evaporator, electric power and refrigerant. The witness agreed with the definition of the Guide and Data Book of the American Society of Heating, Refrigerating and Air Conditioning Engineers, as well as with certain dictionary definitions in general terms. Mr. Soling disagreed with the definition of refrigeration in the Encyclopaedia Britannica, Vol. 19 (1969), on the basis that a tie-in to a refrigeration cycle or refrigeration compressor was necessary to complete that definition.

On redirect examination, witness Soling testified that farm bulk milk tanks were not domestic refrigerators, storage refrigerators, service refrigerators, reach-in or walk-in refrigerators, refrigerator display cases, cabinets, or rooms. The mounting of the refrigeration components on the ends of the tanks in question is for the convenience of the purchaser and results in savings at the time of installation. Mr. Soling further emphasized that without the components, shown in plaintiff's exhibit 17, a photograph of the refrigeration unit, the farm bulk milk tanks are incapable of performing a refrigeration function. In his opinion, the involved merchandise is a "bulk cooler, not a bulk refrigerator."

Defendant called as its first witness Mr. Raymond Schneider, an assistant professor at New York City Community College, giving courses in refrigeration. In addition to that he also maintains a refrigeration service business. Mr. Schneider taught at the State University of New York at Farmingdale, New York Technical Institute and the Phoenix Technical School giving refrigeration courses. His experience also includes a position as engineering manager for Slant-Fin Corporation which involved air conditioning. Prior to that he was employed by Strautus Division of Fairchild Corporation which involved work on military refrigeration and air conditioning equipment. Mr. Schneider is a member of the American Society of Heating, Refrigerating and Air Conditioning Engineers, and the Refrigeration Service Engineers Society. The witness is a licensed professional engineer in the State of New York. Mr. Schneider testified

that refrigeration is basically the removal of heat from an area where it is not wanted and moving it to an area where it is not objectionable. His definition of a refrigerator was an enclosure designed to maintain a space at a lower temperature. The witness agreed with various dictionary definitions as well as those of the Encyclopedia Americana, Vol. 23 (1975), at page 315, and various other handbooks and encyclopedias.

On cross-examination the witness testified that he has sold reach-in and walk-in refrigerators but has never sold household refrigerators nor has he seen merchandise of the kind before the court.

Mr. Schneider agreed that a condenser, receiver and compressor were essential to the operation of a refrigeration cycle and that without it, it could not operate as a refrigerator.

Defendant next called Mr. Joseph Smucker, who is presently employed by the U.S. Food and Drug Administration as senior regional milk specialist. The witness obtained his bachelor of science degree in agriculture from Ohio State University and has been employed by the FDA in Chicago, Illinois and Detroit, Michigan, as well as New York. Prior to that, he was employed as a milk survey officer for the State of Ohio. Before going with the State of Ohio, Mr. Smucker was employed by the Orville Milk Company in Ohio as dairy plant field man for nine years. In all of these positions it was his duty to visit dairy farms for the purpose of inspection for quality purposes. The witness is a member of the International Association of Milk and Food Sanitarians, as well as the Northeast Dairy Council.

The witness, after viewing plaintiff's exhibit 1, testified that he was familiar with bulk milk coolers and the various components of them. According to the witness, the primary function is to cool milk. Its function also has requirements with respect to sanitation, storage and agitation of the milk. The purpose of the agitator is twofold, namely, to agitate the milk during the process of cooling to aid in the cooling, as well as assisting in obtaining a homogeneous sample of the milk. Based upon his observation, bulk milk coolers are not used without refrigeration. The cooling of milk is a requirement of the pasteurized milk ordinance.

On cross-examination Mr. Smucker testified that he was familiar with the dairy farm inspection report form (plaintiff's exhibit 25) based upon the pasteurized milk ordinance. The form is used during the inspection of a grade A dairy farm and a copy is usually left with the farmer after inspection. The witness marked with a circle the numbers on plaintiff's exhibit 25 relating to bulk milk tanks. Of the 21 numbers contained thereon the witness circled numbers 6, 8, 9–13, 16, 18, 19 and 21. Of these only number 19 relates to cooling. Mr. Smucker testified that in addition to the cooling function, a bulk tank

also performs a storage function and protects the contents from external contamination. The agitation of the milk is necessary to properly cool the milk, to obtain a proper sample and to prevent leather-like or cream-like conditions from forming on the surface of the milk when it is retained in the tank. The witness further stated the tanks have a measuring device which is related to how the farmer is paid for his crop.

Based upon the record as made, it has been satisfactorily established that the bulk farm tanks, such as involved herein, are chiefly used on farms and not in commercial establishments. In addition, the parties at the outset of the trial stipulated that raw milk is an agricultural product. While the tanks store the milk and maintain it in a marketable condition until picked up by the dairy, they do not perform a marketing function as did the egg-handling machines in *Staalkat of America, Inc.* v. *United States*, 56 CCPA 86, C.A.D. 959, 417 F. 2d 789 (1969). The use here precedes the marketing aspect of the sale of milk.

There is no dispute between the parties that the tanks in their condition as imported contained neither a compressor, condenser, nor receiver. Likewise, there is no dispute that the tanks could not perform a cooling function without these components. Nevertheless, it is the contention of defendant, in support of its classification, that said tanks are refrigerators or refrigerating equipment or parts thereof. This position is based upon the common meaning of the terms refrigerators and refrigerating equipment.

Tariff terms are construed in accordance with their common or commercial meaning, which is presumed to be the same. *Floral Arts Studio, et al.* v. *United States*, 46 CCPA 21, C.A.D. 690 (1958); *United States* v. *C. J. Tower & Sons of Buffalo, N.Y.*, 48 CCPA 87, C.A.D. 770 (1961). In the absence of a contrary legislative intent or a commercial designation, tariff terms are construed according to their common meaning. In the case at bar research fails to reveal a contrary legislative intent. Neither party attempted to establish a commercial designation which differs from the common meaning. Therefore, the common meaning controls.

Common meaning is a question of law to be decided by the court. Testimony of witnesses is advisory and not binding on the court. *United States* v. *O. Brager-Larsen*, 36 CCPA 1, C.A.D. 388 (1948); *Tropical Craft Corp.* v. *United States*, 45 CCPA 59, C.A.D. 673 (1958); *United States* v. *National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961). In order for the court to determine the common meaning of the term it may consult dictionaries, lexicons and scientific authorities. When the term involved is of a technical nature, the court may rely upon technical sources since dictionaries prepared

for general use may not properly reflect the meaning in the trade or industry involved. *E. Dillingham, Inc.* v. *United States*, 61 CCPA 34, C.A.D. 1114, 490 F. 2d 967 (1974). The definition of "refrigerator" contained in the handbook published by the American Society of Heating, Refrigerating and Air Conditioning Engineers (1972), at page 542, was read to witness Soling and is as follows:

> Refrigerator—A container and means of cooling it, such as a cabinet refrigerator; or a large container such as a storage refrigerator, service refrigerator, etc.

This definition requires a means of cooling the container or cabinet. A review of the various general dictionary definitions, as well as lexicographic information contained in the record and briefs, establishes that the article must contain a method of cooling by mechanical or chemical means. Accordingly, a refrigerator must have the means to cool. The tanks involved in their condition as imported do not contain such equipment. The mere fact they are designed for use with such equipment does not *per se* make them refrigerators.

The legislative intent of Congress in enacting subpart A is evidenced by the title assigned to said provision which reads: "Boilers, Non-Electric Motors and Engines, and Other General Purpose Machinery." Further legislative intent of the type of article intended to be encompassed by said provision is indicated in the following statement in the Tariff Classification Study, Schedule 6, part 4, subpart A, at page 260:

> This subpart covers a wide variety of machinery and appliances which can be used in numerous industrial applications. As set forth in headnote 1 to this subpart, any machine or appliance which is described in this subpart and also is described elsewhere in this part is classifiable in this subpart. The systematic grouping of general-purpose machines and appliances in this subpart, together with the rule expressed in the headnote, would provide greater stability to the product classifications.

The tanks are not general purpose machines, nor are they used for industrial purposes. This expression of intent is more pertinent than certain conclusory statements contained in the Explanatory Notes to the Brussels Nomenclature (1955), chapter 84.15, relied upon by defendant. This is not to say the Brussels Nomenclature may not be utilized in proper circumstances to ascertain intent when ambiguity exists. The intent as indicated by the title of said subpart is not overcome by the statements in Brussels Nomenclature or the Tariff Classification Study. *Great Western Sugar Co. et al.* v. *United States*, 59 CCPA 56, C.A.D. 1038, 452 F. 2d 1394 (1972). I am, therefore, of the opinion that Congress in enacting item 661.35, *supra*, did not intend to include the imported tanks as refrigerators. Inasmuch as

they are not refrigerators, they cannot be considered refrigerating equipment since the refrigerating equipment is the portion that is missing on importation.

Defendant urges that if the court finds the imported articles are not refrigerators due to their inability to cool the tanks, they are nevertheless subject to classification under item 661.35, *supra*, by virtue of General Interpretative Rule 10(h) which provides as follows:

> (h) unless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished;

The Court of Customs and Patent Appeals in *Authentic Furniture Products, Inc.* v. *United States*, 61 CCPA 5, C.A.D. 1109, 486 F. 2d 1062 (1973), held certain unassembled bunk beds which had the side rails missing on importation not to be unfinished furniture. The decision was based on the fact that the absence of a substantial or essential part precludes classification as the unfinished article itself.

In the case at bar, the absence of the refrigeration portion is both substantial and essential. Classification as unfinished refrigerators is, therefore, precluded.

It is further urged by defendant that the imported tanks are parts of refrigerators. The bulk farm tanks are imported with a refrigeration control panel containing an expansion valve which controls the flow of the refrigerant into the evaporator as well as certain wires. Witness Soling, however, testified that the thermal expansion valve was not essential to the operation of the refrigeration unit, provided some other type of expansion valve replaced it.

General Interpretative Rule 10(ij) covers parts in the Tariff Schedules of the United States and provides as follows:

> (ij) a provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part.

It is to be noted that parts do not prevail over a specific provision for such part. In the case of *Robert Bosch Corp. et al.* v. *United States*, 63 Cust. Ct. 187, C.D. 3895, 305 F. Supp. 921 (1969), the court made the following statement in interpreting this language:

> We gather that the words "a specific provision for such part" in the context of Rule 10(ij) are satisfied if a generic term for an article has been listed in the schedules, and must conclude that the language of 685.22 is a sufficiently specific designation for automobile radios and antennas to prevent their classification as parts of automobiles.

By the same token, both provisions of item 666.00 claimed by plaintiff are generic and are sufficiently specific designations to prevent classification as parts of refrigerators.

It is well settled in the field of customs jurisprudence that in the absence of deception, disguise, or intent to perpetrate a fraud upon the revenue of the United States, imported merchandise must be classified with reference to its condition as imported. *United States* v. *Citroen*, 223 U.S. 407 (1912); *United States* v. *Baker Perkins, Inc., et al.*, 46 CCPA 128, C.A.D. 714 (1959); *The Carrington Co. et al.* v. *United States*, 61 CCPA 77, C.A.D. 1126, 497 F. 2d 902 (1974). The record establishes the domestically produced refrigerating unit is attached at the farm at the time the tank is installed in the milkhouse. There is no evidence that the importation without the refrigerating equipment was based upon deception, disguise, or for the purpose of defrauding the revenue of the United States. Therefore, the bulk farm tanks involved in their condition as imported are not refrigerators or refrigerating equipment.

While the above finding precludes a classification under item 661.35, *supra*, defendant's reliance upon certain headnotes in TSUS should be considered. Headnote 1, part 4, subpart A of schedule 6 reads as follows:

> 1. A machine or appliance which is described in this subpart and also is described elsewhere in this part, is classifiable in this subpart.

In view of the finding *supra* that the imported tanks are not refrigerators or refrigerating equipment, this headnote is not applicable.

Headnote 2, part 4 of schedule 6 provides as follows:

> 2. Unless the context requires otherwise and subject to headnote 1 to subpart A of this part, a multi-purpose machine is classifiable according to its principal purpose, but if such a machine is not described in a superior tariff heading as to its principal purpose, or if it has no one principal purpose, it is classifiable in subpart H of this part as a machine not specially provided for.

The tanks involved are special purpose machines designed and constructed in accordance with specifications and requirements of 3–A Sanitary Standards formulated by the International Association of Milk, Food and Environmental Sanitarians, the U.S. Public Health Service and the Dairy Industry Committee. As such, the tanks are designed and used for storage of milk in a cooled condition and must be constructed of stainless steel, have an agitator, measuring device, etc. The record establishes to my satisfaction that many of the requirements are coequal with the requirement for cooling. Item 666.00, *supra*, sets forth more specific requirements than does the provision in subpart H for machines not specially provided for and is, therefore, more specific. Item 666.00 is a use provision. The record establishes that the involved tanks are chiefly used on a farm for agricultural purposes. Courts have always given agricultural free lists a

broad and liberal construction in order to carry out the legislative intent of Congress to favor agriculture. *C. J. Tower & Sons of Buffalo, Inc., et al.* v. *United States*, 63 Cust. Ct. 119, C.D. 3884 (1969).

The legislative history as set forth in Senate Report 530 of the Tariff Schedules Technical Amendments Act of 1965, dated August 2, 1965, indicates an intent to clarify item 666.00, *supra*. The language indicative of this is as follows:

> They also clarify the duty-free status of certain agricultural machinery and implements (and parts) by adding milking machines and onfarm equipment for the handling and drying of agricultural or horticultural products to the duty-free list.

Headnote 2, part 4 of schedule 6 is, therefore, not applicable or binding.

Plaintiff has the twofold burden of establishing not only the incorrectness of the classification but must in addition affirmatively establish the proper classification of such merchandise. The witnesses who were familiar with such merchandise and who were questioned all testified that the bulk tanks are chiefly used on farms. The uncontroverted testimony of witness Guest establishes that the milking system is considered to be handling equipment.

Whether or not the tanks fall within the provision for "handling," they most certainly are within the statutory language "agricultural implements." The claim for free entry under item 666.00. *supra*, is, therefore, sustained.

Judgment will be entered accordingly.

(C.D. 4694)

PREPAC, INC. *v.* UNITED STATES

Picnic bags

Plastic picnic bags having handles and zipper closures claimed to be classifiable as articles of plastics under item 774.60, Tariff Schedules of the United States, *held* properly classified under item 706.60, *supra*, as luggage.

The utilization of language in the legislative history to include bags fitted for dining and drinking is indicative of an intent to include within subpart D, schedule 7, part 1, luggage or travel goods used for those purposes.

Court Nos. 72-6-01379-S, etc.

Port of New York

[Judgment for defendant.]

(Decided April 22, 1977)

Serko & Simon (*Gerald B. Horn* and *Joel K. Simon* of counsel) for the plaintiff, *Barbara Allen Babcock*, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

FORD, Judge: These severed actions consolidated for the purpose of trial, involve plastic articles described on the invoices as picnic bags and designated as style nos.: 153, 154, 179, 186 and 188. The merchandise described above was classified as luggage under item 706.60, Tariff Schedules of the United States, and assessed with duty at the rate of 20 per centum ad valorem.

Plaintiff claims said bags are not luggage, nor are they *ejusdem generis* with the articles enumerated in schedule 7, part 1, subpart D, headnote 2(a)(i) of the Tariff Schedules of the United States. Accordingly, it is contended they are properly subject to classification as other articles of plastics not specially provided for under item 774.60, Tariff Schedules of the United States, as modified by T.D. 68-9, and, as such, subject to duty at the rate of 10 per centum ad valorem or 8.5 per centum ad valorem, depending upon the date of importation. Claims as to all other merchandise or styles were abandoned by plaintiff at the trial and are accordingly dismissed.

The statutory provisions as are pertinent herein provide as follows:

Schedule 7, Part 1, Subpart D:

Subpart D headnotes:

* * * * * * *

2. For the purposes of the tariff schedules—
   (a) the term "luggage" covers—
      (i) travel goods, such as trunks, hand trunks, lockers, valises, satchels, suitcases, wardrobe cases, overnight bags, pullman bags, gladstone bags, traveling bags, knapsacks, kitbags, haversacks, duffle bags, and like articles designed to contain clothing or other personal effects during travel; and
      (ii) brief cases, portfolios, school bags, photographic equipment bags, golf bags, camera cases, binocular cases, gun cases, occupational luggage cases (physicians', sample, etc.), and

like containers and cases designed to be carried with the person, except handbags as defined herein;

* * * * * * *

Luggage and handbags, whether or not fitted with bottle, dining, drinking, manicure, sewing, traveling, or similar sets; and flat goods:

* * * * * * *

Of other materials:

* * * * * * *

706.60	Other	20%	ad val.

* * * * * * *

Part 12. – Rubber and Plastic Products

* * * * * * *

Subpart D. – Articles Not Specially Provided For, of Rubber or Plastics

* * * * * * *

774.60	Other	10%	ad val. [1971] or 8.5% ad val. [1972, 1973]

The record consists of the testimony of four witnesses, two called on behalf of each party. In addition, eight exhibits were received on behalf of plaintiff and eight exhibits for defendant. Three of the four witnesses testified the use of the involved bags was to carry food and beverages as well as picnic supplies. Defendant's witness, Wiskin, an attorney with the Department of Justice, testified he used a similar type of bag to carry baby supplies such as diapers, extra clothing, books and toys, as well as food. In the opinion of the court the carrying of baby supplies is a fugitive use and not indicative of the primary use of such bags.

The record establishes without contradiction that the bags involved are of various sizes and decorations and are composed of plastic. The bags have one or two handles, have a zippered enclosure and are insulated with fiberglass or polyethylene. The insulation is for the purpose of keeping the food and beverage warm or cool, as desired. Such items are sold to major department stores, discount stores, supermarket chains, variety stores and drug chains.

Based upon this record plaintiff contends the imported picnic bags are not *ejusdem generis* with the exemplars set forth in headnote 2(a) of schedule 7, subpart D, which defines luggage. This position, plaintiff urges, is warranted since the phrase in headnote 2(a)(i) "and like articles designed to contain clothing or other personal effects during travel" is used. Food and beverages, according to plaintiff, are not personal effects.

Defendant, on the other hand, contends the imported bags fall within the purview of the definition of luggage contained in the headnote by virtue of the statutory scheme of the Tariff Schedules of the United States and the legislative history. Defendant also urges the rule of construction, *ejusdem generis*, is applicable only where the legislative intent is in doubt, or is ambiguous, and in any event is not invoked for the purpose of narrowing, limiting, or circumscribing the enactment. *Sandoz Chemical Works, Inc.* v. *United States*, 50 CCPA 31, C.A.D. 815 (1963).

Plaintiff's reliance on *Adolco Trading Co.* v. *United States*, 71 Cust. Ct. 145, C.D. 4487 (1973), is misplaced. In the *Adolco* case, the merchandise involved plastic shopping bags which the court held not to be luggage, nor *ejusdem generis* with the exemplars set forth in headnote 2(a) of schedule 7, subpart D. In arriving at this conclusion the court therein made the following observations:

> The bags involved herein are not among the named articles in either subsection. The question thus is whether they are "like articles designed to contain clothing or other personal effects during travel" or "like containers and cases designed to be carried with the person, except handbags."
>
> The exemplars in subsection (i) are all articles customarily used for travel, which can be closed and usually locked. The bags before the court cannot be locked or even closed securely. They could not be handled as checked baggage on trains, buses or airplanes, because the articles in them would fall out when given normal baggage handling. For the same reason, they could not be placed in overhead racks or airplane lockers. Moreover, people do not ordinarily carry personal clothing in open bags where it can become soiled or is in danger of falling out. The instant bags are not designed or suitable for carrying clothing or personal effects during travel, and according to the evidence presented, are rarely so used. * * *

In the case at bar the bags may be securely closed, as each of them has a zipper, which would prevent articles from falling out or being stolen. In addition, it is apparent the shopping bags were not used for travel. In the case at bar the bags are used for the convenience of the user while traveling (carrying food in an automobile or for picnic purposes).

The imported picnic bags do not appear to fall within the common understanding of luggage, and while food or beverage is not ordinarily considered personal effects, the primary purpose of the court is to ascertain the intent of Congress in enacting this provision.

In order to ascertain this intent the court may consult the Tariff Classification Study (1960). *Mego Corp.* v. *United States*, 62 CCPA 14, C.A.D. 1137, 505 F.2d 1288 (1974).

The following information is contained in the Tariff Classification Study, Schedule 7, part 1, subpart D, at pages 47 and 51:

> In the Tariff Act of 1930 specific provision is made in paragraph 1531 for luggage, handbags, and billfolds, coin purses and similar "flat" goods wholly or in chief value of leather. When the Act of 1930 was passed, probably the bulk of these articles were made principally of leather, but today they are made principally of materials other than leather. Certain of these articles of metal and designed to be carried on the person, such as handbags, coin purses, and cigarette cases, are specifically provided for in tariff paragraph 1527(c). Luggage, handbags, and flat goods of all other materials, however, are dutiable under various "catch-all" paragraphs throughout the tariff act according to component material of chief value, unless that material happens to be one which imitates leather, in which case the articles are dutiable at the rates applicable to leather articles by virtue of the similitude provisions of paragraph 1559. This subpart brings together all of these scattered provisions in a single group of greatly simplified, related provisions.
>
> This subpart would cover all luggage, handbags, and flat goods of whatever material composed, except cases for musical instruments (schedule 7, part 3), cases suitable for pipes or for cigar or cigarette holders (schedule 7, part 9), and cases, purses, or boxes of precious metals or precious stones (provided for in the schedule on jewelry, schedule 7, part 6A). The luggage and handbags covered here may be fitted with bottle, dining, drinking, manicure, sewing, traveling or similar sets of a type used for convenience while traveling, in which case the set is dutiable in this subpart with the containing luggage or handbag, but this subpart does not cover cases designed to hold, and ordinarily sold at retail with, other types of articles, such as a camera case, a binocular case, or a microscope case, when imported with the article which it is designed to hold. When so imported, such cases are dutiable with the article. When imported in separate shipments without the article, however, such cases are covered by this subpart.
>
> * * * * * * *
>
> Item 706.60 is the basket provision for this subpart to cover all other luggage, handbags, and flat goods. The proposed rate for this item is 20 percent ad valorem which is an approximate weighted average of the numerous rates now applicable to imports of these commodities. Articles covered by this item are now dutiable under paragraph 31(a) (2) (plastic articles) * * *.

The utilization of the language to include bags fitted for dining and drinking is indicative of an intent to include within this subpart luggage or travel goods used for those purposes. The record herein is incontroverted with respect to the use of the imported picnic bags, viz., to carry food and beverages on trips. Accordingly, it is clear that the

intent in enacting this provision was to encompass such travel goods as are primarily used for travel which are utilized for food and beverage.

The claim for classification under item 774.60, *supra*, is therefore overruled and judgment will be entered accordingly.

(C. D. 4695)

WACKER CHEMICAL CORPORATION *v.* UNITED STATES

Unwrought silicon

UNWROUGHT SILICON—MONOCRYSTALLINE SILICON INGOTS

Hyperpure monocrystalline silicon ingots, which are centerless ground to comply with customers' diameter specifications and flatted to identify the crystal orientation, are within the purview of headnote 3(a) of part 2, schedule 6, TSUS. Accordingly, the ingots are properly dutiable under item 632.43, TSUS, as unwrought silicon, rather than under item 658.00, TSUS, the basket provision for base metal articles.

Court No. 75-7-01741

Port of New York

[Judgment for plaintiff.]

(Decided May 9, 1977)

Murray Sklaroff, Esq., for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*John N. Politis* and *Mark K. Neville, Jr.*, trial attorneys), for the defendant.

NEWMAN, Judge: This action concerns the proper tariff classification for certain hyperpure monocrystalline silicon rods or ingots imported by plaintiff from West Germany in 1974 and entered at the port of New York.[1]

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[1] The case was limited by plaintiff to specific articles designated on the invoices with the entries, as follows (R. 10-12):

Protest	Entry Number	Article Designation
1001-5-003487	K344853	AB 37856
	K111327	AB 37958, AB 37959
	K101666	AB 37856, AB 37908, AB 37978
	K106121	AB 37913, AB 37908, AB 20009
	K355669	AB 37910, AB 37229
1001-5-003489	K353216	AB 37911, AB 37164, AB 37907, AB 37912
	K340100	AB 20011, AB 37942, AB 37996
	K359453	AB 37606
	K358340	AB 37550, AB 37605

Entry K344851 in protest 1001-5-003489 was abandoned (R.11).

The merchandise was assessed with duty at the rate of 9 per centum ad valorem pursuant to the provision in item 658.00, TSUS, as modified by T.D. 68–9, for articles of base metals not provided for elsewhere in subpart G of part 3, schedule 6. Plaintiff claims that the importations are properly dutiable at the rate of 5 per centum ad valorem under the provision in item 632.43, TSUS, as modified by T.D. 68–9, for unwrought silicon, containing by weight over 99.7 percent of silicon.

For the reasons stated herein, I have concluded that plaintiff's claim should be sustained.

STATUTES INVOLVED

Classified under:

Schedule 6, Part 3, Subpart G:

Subpart G. – Metal Products Not Specially Provided For

Subpart G headnote:

1. This subpart covers only articles of metal which are not more specifically provided for elsewhere in the tariff schedules.

* * * * * * *

658.00	Articles of base metals not provided for in the foregoing provisions of this subpart, not coated or plated with precious metal----------	9% ad val.

Claimed under:

Schedule 6, Part 2, Subpart K:

Part 2 headnotes:

1. This part covers precious metals and base metals (including such metals when they are chemically pure), their alloys, and their so-called basic shapes and forms, and, in addition, covers metal waste and scrap. * * *

* * * * * * *

3. For the purposes of this part, unless the context requires otherwise—

(a) the term "unwrought" refers to metal, whether or not refined, in the form of ingots, blocks, lumps, billets, cakes, slabs, pigs, cathodes, anodes, briquettes, cubes, sticks, grains, sponge, pellets, shot, and similar primary forms, * * *

* * * * * * *

Subpart K. – Other Base Metals

	Other base metals, unwrought, and waste and scrap of such metals:	
	Other than alloys; and waste and scrap:	
	* * * * * * *	
	Silicon:	
	* * * * * * *	
632.43	Containing by weight over 99.7 percent of silicon---	5% ad val.

THE RECORD

At the trial, each party presented the testimony of one witness. Plaintiff's witness was Vern Meissner, its Vice-President of Sales and Marketing; defendant's witness was John William Burd, the Manager of Materials Technology and Development at Monsanto Company. Additionally, plaintiff introduced in evidence eleven exhibits and the official papers; defendant introduced two exhibits.

The facts are:

The importations comprise hyperpure monocrystalline silicon rods or ingots containing by weight over 99.7 percent of silicon. Hyperpure monocrystalline silicon is a semiconductor material, and the rods are used by plaintiff's customers in making semiconductor devices for various electronic applications such as computers, watches, clocks, radios, calculators and space satellites.

The method of producing the imports is not in dispute, and may be briefly described as follows:

Metallurgical grade silicon in granular form (approximately 96 percent pure silicon) is reacted with hydrochloric acid resulting in a hyperpure form of silicon, trichlorosilane (a gas). After further purification, trichlorosilane is decomposed in a hydrogen atmosphere and deposited onto electrically heated filaments of hyperpure polycrystalline silicon known as "slim rods". This "slim rod" process produces hyperpure polycrystalline silicon rods.

The polycrystalline silicon rods, however, are unusable as semiconductor material because their crystal structure is randomly oriented and lacks the desired electrical characteristics. Consequently, the polycrystalline rods are further processed into monocrystalline rods, which possess a suitable crystal structure and electrical properties for use as a semiconductor material.

There are two methods used for converting a polycrystalline silicon rod into a monocrystalline silicon rod: the float zone method and the Czochralski method.

In the float zone process, a rod of polycrystalline silicon is suspended in a chamber, and a molten zone is induced in the silicon using radio

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frequency induction heating. A seeding operation is accomplished by first melting the lower portion of the polycrystalline rod by use of a radio frequency induction coil, and gradually bringing the molten zone in contact with a single crystal seed. The molten zone is then slowly moved away from the seed crystal, and the growing crystal assumes the orientation of the seed crystal so that the polycrystalline rod assumes the crystal habitat of the seed.

In the Czochralski method, polycrystalline silicon is deposited in a quartz crucible and melted down by induction or resistance heating. A small single crystal seed is then dipped into the melt and withdrawn under controlled conditions. The molten silicon adheres to the seed crystal, aligning itself with the molecular structure of the seed crystal to form a single crystal silicon rod.

To be useful as a semiconductor material, silicon must neither be too pure nor contain excessive amounts of impurities. Thus, in both the float zone and Czochralski methods, carefully measured amounts of impurities referred to as "dopants" (phosphorous or other materials) are added to the silicon for the purpose of imparting the desired "resistivity property" (R. 82) or "the electrical characteristics * * * that are desired by the ultimate customer or user of the single crystal silicon" (R. 121). This "doping" process, while causing monocrystalline silicon to be less pure than polycrystalline silicon, does not cause the former to be less pure than 99.7 percent of silicon by weight.

Since plaintiff "grows" 95 percent of its monocrystalline rods larger in diameter than is specified by its customers, the rods must be "centerless ground" by passing them along a grinding wheel while at the same time rotating the silicon rods.[2] Plaintiff grinds the rods to within plus or minus 25 microns of the specified diameters, inasmuch as plaintiff's customers "need those tolerances to fit these particular rods or the slices into machinery that is existing at that time in * [their] plant[s]" (R. 92–93).

In addition to centerless grinding, plaintiff determines the crystal orientation of the monocrystalline rods by laser beam or X-ray; and as a means of coding or identifying such crystal orientation, a portion of the circumference of each rod is "flatted". Flatting identifies the crystal orientation of a particular monocrystalline ingot and "is a method of coding the wafers, in addition to providing a cleavage reference plane" (R. 127).

After centerless grinding and flatting, the monocrystalline ingots are etched to remove any damage caused by grinding.

The monocrystalline silicon rods are used by plaintiff's customers as a material for manufacturing semiconductor devices. The rods are

[2] Article AB 20011 in entry K340100 was not centerless ground (R. 34-35).

cut into thin slices or wafers, and depending upon the particular devices to be made of the material, the slices may be polished and further processed by adding impurities into the slices by diffusion, by oxidizing the slices, and by alloying them. Also, the slices may be processed by the epitaxial deposition of silicon onto a silicon wafer. The slices are probe-tested for resistivity and scribed to separate the individual chips on the wafer. Additionally, leads may be put on the devices, and they may be encapsulated in some form.

OPINION

There appears to be no dispute that: 1) the imported monocrystalline silicon rods or ingots contain by weight over 99.7 percent of silicon; 2) the imports were produced from hyperpure polycrystalline silicon rods, and such rods, because of their randomly oriented crystal structure and electrical characteristics, are unusable as a semiconductor material; and 3) the imports were centerless ground and flatted. The principal dispute is one of law, involving the applicability of headnote 3(a) of part 2, schedule 6 (hereinafter headnote 3(a)) to the monocrystalline ingots.

Plaintiff contends that the merchandise is "unwrought" as defined in headnote 3(a) since "it is no more than a primary form, to wit, a source of supply of the metal silicon". Defendant, on the other hand, argues that headnote 3(a) is inapplicable inasmuch as "[i]n the manufacture of the imported merchandise, polycrystalline silicon rod, a primary form of hyperpure silicon, has been converted into monocrystalline silicon rod, which is not a primary form of hyperpure silicon". The Government further urges that "[t]he precise centerless grinding, flatting, and subsidiary operations performed on the imported merchandise are of such character as to advance the monocrystalline rod, precluding item 632.43, TSUS, treatment".

At the outset, we shall consider whether the monocrystalline structure of the rods precludes their classification as "unwrought" as that term is defined in headnote 3(a).

Headnote 3(a) enumerates various primary metallic forms which are useful only as a source of a particular metal. The record shows that hyperpure monocrystalline silicon first appears in the rod or ingot form and that the imports are used by manufacturers of semiconductor devices only as a source of the desired metal. Although the crystalline structure and electrical properties of hyperpure silicon affect its usefulness as a semiconductor material,[3] the crystalline structure of the silicon does not affect its primary form as a rod or ingot. Hence, in my opinion, a monocrystalline silicon rod is as much

[3] As noted *supra*, polycrystalline silicon is not usable as a material for making semiconductors because of its randomly oriented cyrstalline structure.

a primary form of hyperpure silicon as is a polycrystalline silicon rod, which defendant concedes falls within the purview of headnote 3(a).[4]

We now turn to defendant's argument that "in addition to the significant advancement marked by the growth of the monocrystalline rod, centerless grinding and flatting are also significant advancements that take the newly-created rod out of primary form status".

Contrary to defendant's contention, the record establishes that the centerless grinding and flatting operations, while performed with precision, do not significantly advance the monocrystalline rods toward their ultimate use in the production of semiconductor devices. The centerless grinding operation serves merely to fulfill the diameter specifications of plaintiff's customers so that the rods or slices cut from the rods will fit the semiconductor manufacturer's processing equipment (R. 92–93, 124),[5] while flatting serves only to identify the crystal orientation of the particular ingot for scribing and other purposes. According to defendant's witness Burd, flatting "is a method of coding the wafers, in addition to providing a cleavage reference plane" (R. 127). When Burd was questioned on cross-examination as to whether the flat would manifest itself on the final product, he reluctantly admitted that out of 400 to 500 circuits on a wafer, a mere 10 to 12 circuits might retain a portion of the flat (R. 145).

The short of the matter is that I am not persuaded that either the centerless grinding to specifications or the flatting operation precludes an "unwrought" status for the merchandise within the purview of headnote 3(a).

Finally, plaintiff has called this Court's attention to the recent decision of our Appellate Court in *United States* v. *Texas Instruments, Incorporated*, 64 CCPA 24, CAD 1178, 545 F. 2d 739 (1976). There, the Appellate Court describes what appears to be the Czochralski method of producing monocrystalline silicon ingots, and the subsequent processing of the ingots into slices and then into transistors.

The issue in *Texas Instruments* concerned item 807.00, TSUS, which provision covers articles assembled abroad of components fabricated in the United States. The Court of Customs and Patent Appeals held that scoring and breaking a silicon slice along provided so-called "streets" to separate individual transistor areas commonly

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[4] It appears from plaintiff's exhibit 6, a letter from the Bureau of Customs (renamed United States Customs Service) to Mr. Meissner, dated August 28, 1968, that administratively the Bureau made no distinction between silicon ingots solely on the basis of their crystalline structure, contrary to the position urged by defendant in the instant case. The Bureau's letter states:

> Crystal ingots unadvanced or merely cut to facilitate transportation or to fulfill purchaser specifications are classifiable as unwrought metal. * * *
>
> Crystal ingots which are further advanced are classifiable under item 658.00, with duty at the rate of 16 percent ad valorem. Included in this classification are crystals which have been subjected to X-ray diffraction to determine crystal orientation.

See also plaintiff's exhibit 7 (Reply to Inquiry, VAL: 4.133B).

[5] The Bureau's letter to Mr. Meissner (exhibit 6) states: "Crystal ingots unadvanced or merely cut to facilitate transportation or *to fulfill purchaser specifications* are classifiable as unwrought metal". [Emphasis added.]

created on the slice did not constitute "further fabrication" of the transistor areas within the meaning of item 807.00(a), and consequently the imported transistors qualified for item 807.00(a) treatment.

The Government's argument in *Texas Instruments* respecting item 807.00, which the Appellate Court rejected, is somewhat analogous to its position here respecting headnote 3(a). Relative to item 807.00, defendant argued that the scoring operation performed abroad was a precise, complex machining process conducted at extremely close tolerance, which was a step in the further fabrication of the silicon transistor chips resulting in their enhancement in value or improvement in condition, thereby precluding item 807.00 treatment. As noted *supra*, in the instant case defendant urges that centerless grinding and flatting are precise and complex machining operations, which significantly advance the ingots beyond a primary form of metal within the purview of headnote 3(a).

Upon a careful analysis of the evidence and the arguments of counsel, I conclude that the monocrystalline silicon ingots are properly dutiable as unwrought silicon under item 632.43, TSUS.

Plaintiff's claim is sustained and judgment will be entered accordingly.

(C.D. 4696)

WALKER ENTERPRISES, LTD. *v.* UNITED STATES

Plastic visors

MOTION TO DISMISS ACTION—LIMITATION ON PROTEST FILINGS

An action commenced by an importer on the basis of the second of two protests filed against entries of plastic visors will be dismissed on jurisdictional grounds on motion of the government made before answer where the record shows that the only effective protest filed against said entries in accordance with 19 U.S.C.A. § 1514(b)(1) which authorizes the filing of only one protest was the initial protest concerning which no judicial review was sought by the importer following administrative denial, and which could have been amended to include the additional claim under 19 U.S.C.A. § 1520 sought to be advanced by the importer by means of the second protest.

Court No. 74-11-03229

Port of Champlain-Rouses Point

[Dismissed.]

(Dated May 12, 1977)

Barnes, Richardson & Colburn (*Joseph Schwartz* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Steven P. Florsheim*, trial attorney), for the defendant.

RICHARDSON, Judge: In this action defendant moves pursuant to Rule 4.7 for an order dismissing the action on the ground that the court lacks jurisdiction of the subject matter. Defendant contends that the two entries [1] involved herein, bearing numbers 73–102752 and 73–175330, were liquidated on June 29, 1973, that protest bearing number 0712–3–000427 (hereinafter referred to as the 427 protest) was filed by plaintiff against these liquidations on September 26, 1973, that the 427 protest was denied on November 30, 1973, and that this action was instituted by plaintiff on November 25, 1974, or more than 180 days after denial of the 427 protest contrary to the requirements of 28 U.S.C.A., section 2631(a) which mandates commencement of an action in this court within 180 days of the denial of a protest.

Plaintiff opposes the motion, contending that the action was commenced within 180 days of the denial of protest bearing number 0712–4–000043 (hereinafter referred to as the 043 protest) which was filed on January 28, 1974, against the same entries, and denied on May 29, 1974. Plaintiff maintains that the 043 protest is directed against the district director's refusal to reliquidate the subject entries in accordance with 19 U.S.C.A., section 1520(c)(1), and that it is the only protest which is the subject of this action.

The official papers under entry numbered 73–102752 disclose that the visors were entered under TSUS item 774.60 at the duty rate of 8.5 *per centum ad valorem* and were classified in liquidation under item 772.30 at the duty rate of 12.5 *per centum ad valorem*. And the official papers under entry numbered 73–175330 indicate that the visors were entered and classified in liquidation under item 772.30 at the duty rate of 12.5 *per centum ad valorem*. In the 427 protest, a copy of which is annexed to the moving papers, plaintiff sought classification of the visors covered by both entries under item 774.60. The 427 protest is also referred to in an Application for Further Review contained among the official papers in entry numbered 73–102752 as follows:

> ". . . These entries were initially protested under Protest #0712–3–001427 [sic] dated 9/26/73, denied 11/30/73. In accordance with CR 174.24(a) we request further review of this protest."

The applicable statute, 19 U.S.C.A., section 1514(b)(1), authorizes the filing of only one protest as to each entry of merchandise where, as in this case, a single category of merchandise is covered by each entry. And this statute also authorizes the amendment of a protest at the administrative level to include, among other things, a timely

[1] Each entry covers a single category of merchandise, namely, plastic visors for snowmobile helmets.

section 1520 claim which subsequently accrues in favor of the protestant.

Notwithstanding the statutory single protest limitation plaintiff endeavors to draw support for its filing of the 043 protest by asserting in its opposition papers that "[t]hat protest was filed against the failure to reliquidate the entries under Section 520, and was filed within 90 days after the December 26, 1973 ruling by the U.S. Customs Service which is in the Court files." However, in its complaint plaintiff alleges in paragraph 12 thereof that "[t]he error, mistake or inadvertence was brought to the attention of the Customs Service within 90 days after the date of liquidation."

The record reveals that the only notice of error which was brought to the attention of the Customs Service within the 90-day period *following* liquidation of the involved entries on June 29, 1973, was the 427 protest itself which was filed on September 26, 1973. And this protest is not the notice of error contemplated by section 1520.[2] The statute, 19 U.S.C.A., section 1520(c)(1), contemplates a formal request for reliquidation of an entry on the ground of clerical error, mistake of fact or other inadvertence not amounting to an error in the construction of a law, followed by a refusal on the part of the district director to accede to such request. See *J. S. Sareussen Marine Supplies, Inc.* v. *United States*, 62 Cust. Ct. 449, 451, C.D. 3799, 304 F. Supp. 1185, 1186 (1969).

The so-called Customs Service ruling of December 26, 1973, does not qualify as a basis for a section 1520 claim in favor of plaintiff. The document in question does not come within the parameters of paragraph 12 of the complaint inasmuch as it is a letter which responds to a *letter of inquiry dated June 19, 1973*, which, of course, is prior to the liquidations of June 29, 1973. Moreover, the Customs Service letter of December 26, 1973, is not a *ruling*, and is not connected to any *entry of merchandise*. The letter merely purports to answer a customs broker's letter of inquiry regarding the tariff status of a wide-angle flip-on plastic visor for a snowmobile helmet.

Under the circumstances revealed in the record the court agrees with defendant that the only effective protest taken against the involved entries is the 427 protest. And it was never amended as authorized by section 1514(b)(1) to include any subsequently accruing section 1520 claim. The 043 protest is clearly a nullity, and as such, the instant action cannot be maintained inasmuch as it is not supported by any valid protest conferring jurisdiction of the subject matter upon the court.

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[2] The 427 protest constitutes at best a notice to the Customs Service of error in the construction of a law, and as such, is wholly outside of the purview of section 1520. See *Fibrous Glass Products, Inc.* v. *United States*, 63 Cust. Ct. 62, C.D. 3874 (1969), *appeal dismissed*, 57 CCPA 141 (1970).

Defendant's motion to dismiss is granted, and the action is dismissed. An order will be entered herein accordingly.

(C.D. 4697)

KURT ORBAN CO., INC. *v.* UNITED STATES

Steel bars

EXPORT VALUE—LOADING CHARGES

Loading charges are not charges which accrued subsequent to exportation of the involved merchandise and therefore were properly included as part of the export value.

EXPORT VALUE—PRICE FAIRLY REFLECTING MARKET VALUE

There is no evidence in the record of actual sales, or of offers of sale, of such or similar merchandise to all purchasers in the principal markets of the exporting country at the claimed f.a.s. prices within the framework of the export value formula set forth in section 402(b) of the Tariff Act of 1930, as amended.

SEPARABILITY OF APPRAISEMENT

When an appraisement is expressed as a single individual unit, it is not on its face separable. It may, nevertheless, be constructively separable if there is evidence that the appraising officer, in fact, calculated the appraised value by adopting the specific amounts or charges shown on the invoices for the merchandise. Here, the required evidence does not exist as there is nothing in the record from which the court can determine for purposes of separability, which charges, or in what amounts, they were utilized by the appraising officer in determining the appraised values of the merchandise.

Court Nos. R70/1042 and R70/1043

Port of Detroit

[Judgment for defendant.]

(Decided May 17, 1977)

Samuel Frankel for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

RE, Chief Judge: The question presented in these two cases, consolidated for purposes of trial, is the correct dutiable value of certain steel bars exported from Kobe, Japan on August 28, 1969, and entered at the port of Detroit, Michigan on October 17, 1969. The merchandise was appraised on the basis of export value, as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 (19 U.S.C. 1401a(b)).

The steel bars in entry 128466 (Court No. R70/1042) were sold to plaintiff by Nissho-Iwai Co., Ltd., of Toyko, Japan (Nissho) through Nissho-Iwai American Corporation, its subsidiary in New York, for $147.80 (U.S. currency) per metric ton c. & f., Detroit, Michigan. The merchandise in entry 128467 (Court No. R70/1043) was contracted for by the same parties at $134.48 and $136.69 (U.S. currency) per metric ton c. & f., Detroit, Michigan.

The appraisements were made by the appraising officer on a *per se* or unitary basis, arrived at by adopting the total c. & f. Detroit price with an allowance for the invoiced cost of ocean freight, and the invoiced "estimated discharging cost from vessel to pier in Detroit."

Export value is defined in section 402(b) of the Tariff Act of 1930, as amended, as follows:

> "(b) For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States."

Plaintiff contends that, although the appraisements were returned as indivisible units, they are nevertheless constructively separable in that they can be broken down into alleged f.a.s. [free along side (vessel)] prices, plus certain specified costs listed on the special customs invoices. The f.a.s. prices, plus listed costs, total the c. & f. contract prices. In addition to the ocean freight and discharging costs, the special customs invoices set forth the following charges:

(1) "Loading Charge in Japan from Barge onto Vessel,"
(2) survey and tally fees, and
(3) insurance and agency fees.

The record does not explain the nature of the survey and tally fees, or when they accrued. Together with the insurance and agency fees, they are treated by plaintiff as part of the loading charges.

It is plaintiff's position that, since these charges comprise part of "ocean freight," which is a nondutiable charge under the export value statute, they are all nondutiable, and should have been deducted from the appraiser's return of value.

Plaintiff, concentrating on the loading charges which allegedly constitute about 98% of the amounts in dispute, contends that, regardless of the terms or circumstances of sale, loading costs are nondutiable charges. It submits that they are either like, or part of,

"ocean freight" since they are costs which accrue subsequent to exportation. Plaintiff therefore contends that they cannot be part of export value as that term is defined in section 402(b).

Plaintiff argues, alternatively, that whether or not loading charges, like ocean freight, must always be treated as nondutiable, the goods in issue were freely offered and available for sale at the buyers' option, on other terms, including f.a.s. terms. Sales on an f.a.s. basis, plaintiff contends, do not include loading charges which are the responsibility of the purchaser. Since all of the disputed charges are regarded by plaintiff as "loading charges," the specific question presented is whether these loading charges are dutiable under the pertinent statutory provision which defines the export value of imported merchandise.

Plaintiff relies upon the judicially established principle that, for appraisement purposes, loading and inland freight charges are part of dutiable value if the merchandise can only be purchased in the principal markets of the exporting country for exportation to the United States at prices which include such charges. Conversely, if it can be shown that the merchandise was freely offered for exportation in the principal markets at prices which excluded such charges, they do not constitute part of dutiable value. *Albert Mottola* v. *United States*, 46 CCPA 17, C.A.D. 689 (1958), citing *United States* v. *Paul A. Straub & Co., Inc.*, 41 CCPA 209, C.A.D. 553 (1954). Accordingly, plaintiff asserts that, on the record, it has established that the merchandise could have been purchased at the f.a.s. prices shown on the special customs invoices. The f.a.s. prices are the alleged sales prices exclusive of the loading and other disputed charges.

Defendant argues that the *per se* appraisements are not constructively separable since there is no evidence that the appraising officer adopted any or all of the various enumerated charges shown on the customs invoices (loading, survey and tally, insurance and agency fees), and included them in his calculation of the appraised values. The defendant therefore contends that, in the absence of separable appraisements, plaintiff was compelled, but failed, to prove every element of its claimed export values.

Defendant also contends that, even assuming the appraisements to be separable, the disputed charges were nevertheless properly included in export value. Its contention is predicated upon plaintiff's failure to establish that such or similar merchandise was freely offered for sale to all purchasers in the principal markets of the exporting country at f.a.s. prices, exclusive of the loading and other disputed charges.

At the trial, plaintiff called three witnesses: Mr. J. F. Gibson, Mr. Richard Lefler, and Mr. Masayoshi Homma. Mr. Gibson is vice-president of Retla Steamship Company which ships steel from Japan to the United States on chartered modern gear bulk carriers. He

testified that when quoting a tariff rate for shipping steel, the quotation would include the ship's cost, loading and discharging costs, other "minor things," and fuel. In a sale of steel for exportation from Japan to the United States on a c. & f. American port basis, the seller, not the buyer, would usually contract with his company for shipment of the merchandise. The quoted price would also include a loading charge.

The witness stated that "conference" vessels quote a "berth term" or "liner term" rate, which is an all-inclusive rate covering the ship's cost, loading, discharging, and fuel. Nonconference or charter vessels generally contract on a "free-in, free-out [f.i.o.] basis," which covers only the ship's cost, and does not include loading and unloading charges. On that basis, the shipper or the consignee attends to the loading and unloading.

Mr. Richard Lefler is the assistant vice-president of the plaintiff corporation who was responsible for the purchase of the merchandise in issue. He testified that plaintiff had a "variety of choices" regarding the terms of sale from Nissho, citing "c. and f., c.i.f., c.i.f. American port duty paid; f.o.b. inland carried duty, f.o.b. foreign port." The merchandise was purchased on a c. & f. Detroit basis, and the method of transportation was determined by the seller. During July and August 1969, plaintiff did not purchase steel bars from any Japanese trading house on terms other than c. & f., or c.i.f. port of entry.

Mr. Masayoshi Homma, of Nissho-Iwai American Corporation, testified that he was with Nissho in Japan in 1969, and was familiar with the purchase orders and confirmations of the shipments before the court. He stated that it has "always been Nissho's policy to sell our steel bars on any trade terms by buyer's preference," and that the selection of trade terms was made by its customers. Under the c. & f. contracts for the controverted merchandise, Nissho, which was responsible for providing freight, determined the mode of transportation. It used a charter vessel for which it contracted on a "free-in, free-out basis." Therefore, the ocean freight charge, and the other charges for which it contracted separately, are listed on the special customs invoices. If the merchandise had been shipped on a liner or berth term vessel, only one dollar figure, covering all the listed enumerated charges, would have been shown on the invoices.

During the pertinent period, on or about August 1969, Nissho did not sell steel bars for export to the United States on an f.o.b. or f.a.s. basis, but sold only on a c. & f. or c.i.f. basis pursuant to its customers' requests for quotations on c. & f. terms.

The court will first consider plaintiff's contention that the cost of loading goods onto the vessel at the port of exportation is not one of the "expenses incidental to placing the merchandise in condition,

packed ready for shipment to the United States" (section 402(b)). In defining the export value of imported merchandise, section 402(b) expressly speaks of "all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States."

Plaintiff stresses that the lifting of cargo onto a vessel is "an act appropriate and necessary only for exporting," and that it is "the decisive step in severing the merchandise from the country of export." Thus, plaintiff asserts that loading charges are in the nature of ocean freight, which has long been held not to constitute a part of export value since it is a charge which accrues subsequent to the exportation of the merchandise. *United States* v. *The Heyman Co., Inc.*, 50 Cust. Ct. 564, A.R.D. 157 (1963); *United States* v. *Samuel Shapiro & Co. et. al.*, 65 Treas. Dec. 1650, R.D. 3268 (1934); *The John Shillito Company* v. *United States*, 5 Treas. Dec. 555, T.D. 23851 – G.A. 5170 (1902). Loading charges, however, have been held to be akin to inland charges which "accrue in the foreign country prior to shipment to the United States." *Plywood & Door Northern Corporation* v. *United States*, 62 Cust. Ct. 1044, 1047, A.R.D. 256 (1969).

It is well settled that where merchandise is offered for sale only at an f.o.b. price, or a price which always includes inland freight, and never at an ex-factory price or price excluding such costs, the inland freight charges are "bound up in," and form "an integral part of the purchase price." In these instances they are part of the dutiable value of the merchandise. *Albert Mottola* v. *United States*, 46 CCPA 17, C.A.D. 689 (1958), citing *United States* v. *Paul A. Straub & Co., Inc.*, 41 CCPA 209, C.A.D. 553 (1954); *United States* v. *Kurt Orban Company, Inc.*, 44 Cust. Ct. 759, A.R.D. 116 (1960); *Dan Brechner & Co. et al.* v. *United States*, 42 Cust. Ct. 707, A.R.D. 101 (1959).

In *Plywood & Door Northern Corporation* v. *United States*, 62 Cust. Ct. 1044, A.R.D. 256 (1969), birch plywood exported from Finland was freely offered for sale for exportation to the United States exclusively on a c.i.f. American port basis. The court held that the loading charges were not deductible from the c.i.f. prices in determining dutiable export value. In treating "loading charges like other inland charges," which accrue in the foreign country prior to shipment to the United States, the court stated:

> "Accordingly, it is not significant that charges (inland freight or loading) may 'accrue' after the merchandise has been packed ready for shipment to the United States and has left the principal market. Indeed, the inland freight included in the unit values of the plywood involved in this case is conceded by appellant to be dutiable. Hence, as in *Straub* [*United States* v. *Paul A. Straub & Co., Inc.*, 41 CCPA 209, C.A.D. 553 (1954)] and

Mottola [*Albert Mottola* v. *United States*, 46 CCPA 17, C.A.D. 689 (1958)], the important consideration here is that the price at which the merchandise was freely offered for sale in the principal market always included the disputed charge, and not that the loading charges accrued after the merchandise had left the principal market, viz., Helsinki.

Additionally, *since loading charges like other 'inland charges' accrue in the foreign country prior to shipment to the United States, they are not deductible from the c.i.f. selling price in determining export value* on the basis of the principle invoked with respect to ocean freight, which of course accrues subsequent to exportation. Thus, in *United States* v. *The Heyman Co., Inc.*, 50 Cust. Ct. 564, A.R.D. 157 (1963), a charge such as inland freight was distinguished from ocean freight, as follows (*id.* at 572):

> '* * * Inland freight, under a f.o.b. foreign port contract, is an element of expense which accrues while the merchandise is in the foreign country of exportation and, as such, constitutes an appropriate element to be included in the valuation. However, the statutory basis of value before us, namely, export value, admonishes us to reject as an element of value those charges which accrue subsequent to the time the merchandise leaves foreign shores. Such is the nature of ocean freight which, unlike inland freight, accrues subsequent to the time the merchandise is exported from foreign shores and, as such, cannot properly constitute an element of such valuation. *United States* v. *New England Foil Corp.*, 10 Cust. Ct. 596, 597, Reap. Dec. 5856. See also, *United States* v. *F. C. Gerlach & Co., et al.*, 7 Cust. Ct. 494, 504, Reap. Dec. 5443.' [Emphasis added.]" 62 Cust. Ct. at 1047.

Also pertinent is *Joseph Markovits, Inc.* v. *United States*, 56 Cust. Ct. 607, R.D. 11132 (1966) which held that "coolie hire, trucking, lighterage and incidental charges," included in a sale on an f.o.b. vessel basis, must be part of the dutiable export value. See also *American Commercial, Inc.* v. *United States*, 40 Cust. Ct. 690, R.D. 9072 (1958), which held that "go-down" charges, including lighterage to the vessel on which the goods were exported, were not deductible from an f.o.b. selling price in determining export value.

In view of the foregoing authority, it is the determination of the court that the loading charges are not charges which accrued subsequent to exportation of the merchandise. Accordingly, they were properly included as part of the export value of the merchandise in issue.

It was incumbent upon plaintiff to establish that the controverted merchandise which was sold on a c. & f. American port basis was freely sold or offered for sale in the ordinary course of trade to all purchasers at the invoice prices, less the disputed loading charges. *Albert Mottola* v. *United States*, 46 CCPA 17, C.A.D. 689 (1958).

There is no evidence in the record of this case of actual sales, or of offers of sale, of such or similar merchandise at the claimed f.a.s. prices exclusive of the disputed loading charges. Mere expressions of willingness to sell steel bars on any trade terms made by the buyer, as testified by Mr. Homma, do not establish a market price for the merchandise. As stated by Judge Richardson of this court in *Delmonico International Corp.* v. *United States*, 52 Cust. Ct. 656, ARD. 176 (1964):

> "What is actually done in terms of sales or offers of sale is what establishes a market price, and not merely what it is possible to do in the matter of sales or offers of sale. It has been held that a *willingness to sell* merchandise at a price is no evidence of a market price. See *Transatlantic Shipping Co., Inc., et al.* v. *United States*, 28 CCPA 19, C.A.D. 118, and *Golding Bros. Co., Inc.* v. *United States*, 6 Cust. Ct. 877, Reap. Dec. 5196. By the same token, the fact that merchandise *could have been sold* at a price is no evidence of a market price either." (Emphasis in original.)

See also *Joseph Markovits, Inc.* v. *United States*, 56 Cust. Ct. 607, R.D. 11132 (1966); *Louis Goldey Co., Inc.* v. *United States*, 55 Cust. Ct. 759, A.R.D. 196 (1965).

Mr. Lefler, who was responsible for purchasing the merchandise for the plaintiff, stated that he had a variety of choices as to the terms of purchase with Nissho, such as "c. and f., c.i.f., c.i.f. American port duty paid, f.o.b. inland carried duty, f.o.b. foreign port." It is significant, however, that he omitted any reference to doing business on an f.a.s. basis which plaintiff claims is the correct basis for determining the export values.

Plaintiff relies heavily on the testimony of Mr. Homma which, in its opinion, establishes offers to sell on an f.a.s. basis, or on any other basis. The language of section 402(b), however, expressly states "freely sold or, in the absence of sales, offered for sale." Therefore, as stated in the *Louis Goldey Co.* case, "[w]here there are actual sales, such sales are controlling and offers may not be considered." 55 Cust. Ct. at 764. See also *Luckytex, Ltd.* v. *United States*, 63 Cust. Ct. 659, A.R.D. 257 (1969).

Finally, even if plaintiff were able to show that the merchandise was freely available at the invoiced f.a.s. unit prices, less loading charges, it has failed to establish the separability of the appraisements with respect to the disputed charges. The appraisements at bar were made in unitary terms. They were not made in terms of a first cost or f.a.s. price plus the disputed charges, either of which type of appraisement has been held to be separable. Under the so-called doctrine of separability, the party challenging the appraisements may rely upon the presumption of correctness as to all elements of the appraisements which he does not seek to dispute. *Haddad & Sons, Inc.* v.

United States, 54 Cust. Ct. 600, R.D. 10942 (1965), *aff'd*, 56 Cust. Ct. 792, A.R.D. 205 (1966).

When an appraisement is expressed as a single indivisible unit, it is not on its face separable. It may, nevertheless, be constructively separable if there is evidence that the appraising officer, in fact, calculated the appraised value by adopting the specific amounts or charges shown on the invoices for the merchandise. *United States* v. *Gehrig, Hoban & Co., Inc.*, 54 CCPA 129, C.A.D. 924 (1967); *United States* v. *Bud Berman Sportswear, Inc.*, 55 CCPA 28, C.A.D. 929 (1967).

It is apparent from the appraising officer's red check marks placed on the Nissho-Iwai American Corporation invoice in entry 128467 and on the customs invoice in entry 128466 that allowance was made for the stated ocean freight and discharging costs, which are shown on each as "ND" (nondutiable).

It is nowhere indicated, however, on either invoice or through other evidence of record, that the appraising officer and the district director accepted or adopted the f.a.s. prices, and the specific itemized loading charges (including survey and tally fees, and insurance and agency fees) enumerated on the invoices, in calculating the statutory export values of the merchandise. Thus, there is nothing of record from which the court can determine, for purposes of separability, which charges, or in what amounts, they were utilized by the appraising officer in determining the appraised values of the merchandise. *Bowl-O-Beauty Co.* v. *United States*, 75 Cust. Ct. 119, C.D. 4615 (1975); *Concord Electronics Corp.* v. *United States*, 69 Cust. Ct. 241, A.R.D. 304, 345 F. Supp. 1000 (1972), *appeal dismissed*, 60 CCPA 185 (1972).

The fact that the appraised values were equivalent to the c. & f. prices shown on the invoices, less the stated ocean freight and unloading charges, does not establish that the appraisements embraced the listed charges in the same amounts as were shown on the invoices. *Bowl-O-Beauty Co.* v. *United States, supra; Luckytex, Ltd.* v. *United States*, 63 Cust. Ct. 659, A.R.D. 257 (1969), *appeal dismissed*, 57 CCPA 141 (1970). Consequently, the appraisements cannot be deemed separable.

It was thus incumbent upon the plaintiff, in challenging the presumptively correct appraised values, to establish every material element of its claimed values. The plaintiff has not met this burden. There is no evidence of sales to all purchasers at the f.a.s. prices for exportation to the United States within the framework of the export value formula set forth in section 402(b) of the Tariff Act of 1930, as amended.

The court has noted plaintiff's reliance upon a letter, dated March 2, 1970, that it received from the director of the division of appraisement

and collections of the Customs Service. The letter was sent in response to a letter, dated October 28, 1969, by the plaintiff for a decision as to the dutiability of loading charges in the valuation of merchandise sold at c. & f. port of destination prices. No reliance may be placed upon a letter issued subsequent to the appraisement of the controverted merchandise. Furthermore, plaintiff's request posited the existence of f.a.s. terms, and stated that all charges subsequent to delivery f.a.s. (including loading charges) were to be paid by "shipper" who would, in that event, be the buyer. The facts assumed in the letter of inquiry are not the facts found in the case at bar. In view of the plaintiff's failure to establish the existence of f.a.s. sales, the question posed of the customs officials does not apply to the case before the court.

The letter of the director of the division of appraisement and collections stated that where merchandise is only offered for sale at a uniform c.i.f. or c. & f. price to any United States port, with varying charges for ocean freight, "only the lowest actual freight charge is deductible." It may be added to these comments on the letter that the words "freight charge," as used in the letter, cannot be construed, as plaintiff suggests, as expressly including loading charges. In any event, the alleged loading charges incorporated by the appraising officer in the appraised values are not ascertainable, and the court is not bound by any statement in the letter in response to plaintiff's inquiry.

Since plaintiff has not borne its burden of proof in rebutting the presumptively valid appraisements, the appraised values are affirmed, and the appeals for reappraisement are dismissed. Judgment will issue accordingly.

(C.D. 4698)

VOSS INTERNATIONAL CORP. *v.* UNITED STATES

On Defendant's Motion for Partial Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment

Court No. 75-8-02154

Port of Los Angeles

[Motion for partial summary judgment granted; cross-motion for summary judgment denied.]

(Dated May 26, 1977)

Glad, Tuttle & White (*Edward N. Glad* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Wesley K. Caine* and *Bruce M. Mitchell*, trial attorneys), for the defendant.

MALETZ, Judge: In this civil action plaintiff challenges the legality of special dumping duties that were assessed under the Antidumping Act of 1921, as amended (19 U.S.C. 160 et eq.) against certain asbestos cement pipe which was imported from Japan in March 1972.[1] In making this challenge, plaintiff's complaint contains two causes of action, the first of which is the only one relevant to the present motions.[2] In that cause of action, plaintiff contends that the Tariff Commission's determination of injury—which, as noted, is a necessary precondition to the assessment of dumping duties—was invalid under 19 U.S.C. 160(a) on the ground that it was achieved by a two to two vote of the five Commissioners who attended the meeting on the injury question,[3] while the fifth Commissioner present at the meeting declined to vote.[4] According to plaintiff "equal division was achieved by the knowing and willful abstention from voting by * * * [one Commissioner] otherwise participating in the proceedings [and] was *ultra vires* and, therefore, null and void because the Tariff Commission exceeded its statutory authority by entertaining the abstention of a participating commissioner in order to achieve an affirmative determination when his vote would have materially affected the outcome of the proceeding and the nature of the final determination."

As a concomitant issue, plaintiff contends that "the Tariff Commission and the Secretary of the Treasury have each violated the procedures required of notice and reporting by 19 U.S.C. 160(b) because said notice and report of the Tariff Commission's Determination of Injury states that said affirmative determination was achieved because * * * [one Commissioner] 'did not participate in the determination' when, in fact, he was present, and participating in the proceeding wherein the Determination of Injury was affectuated [*sic*], * * *."

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[1] The Antidumping Act provides in general that if a foreign exporter sells merchandise to the United States at a price less than its "fair value," i.e., the price charged by the exporter in his home market—with resultant injury to a U.S. industry—a special dumping duty will be assessed upon the importation of the merchandise. If the exporter and importer are not related, this duty is measured by the difference between the higher "foreign market value" and the lower price charged the U.S. importer. The question as to whether merchandise is being sold at less than fair value is determined by the Secretary of the Treasury. If the Secretary makes an affirmative finding in this regard, the question as to whether there is injury is determined by the United States Tariff Commission (now known as the United States International Trade Commission). If the Commission makes a determination of injury, the Secretary makes and publishes a finding of dumping. See, e.g., *F. W. Myers & Co., Inc., et al.* v. *United States*, 72 Cust. Ct. 219, 220, C.D. 4544, 376 F. Supp. 860, 862 (1974).

[2] In its second cause of action plaintiff alleges that the basis used by the government for calculating the amount of dumping duties was erroneous.

[3] The Tariff Commission has a membership of six Commissioners.

[4] To elaborate on the foregoing, the vote on injury was taken at a meeting of the Commission on April 20, 1972, at which five Commissioners were present. Two Commissioners voted affirmatively that an industry in the United States was being injured by reason of the importation of asbestos cement pipe from Japan; two voted negatively; and the fifth Commissioner present abstained. On the basis of this voting pattern, the Commission found injury pursuant to 19 U.S.C. 160(a).

Defendant argues that plaintiff's contentions are wholly without merit. It adds that there can be no question but that as a matter of law the Tariff Commission's determination of injury was completely valid under 19 U.S.C. 160(a) and that its motion for partial summary judgment as to the first cause of action should be granted. Plaintiff, on the other hand, insists that for the reasons stated above, the Tariff Commission's determination of injury was invalid as a matter of law and that its cross-motion for summary judgment should therefore be granted. For the reasons that follow, it must be concluded that the Tariff Commission's determination of injury was valid as a matter of law, and that defendant's motion for partial summary judgment as to plaintiff's first cause of action must therefore be granted.

At the outset it is settled that a quorum of the members of the Tariff Commission could conduct the business of the Commission. *Frischer & Co.* v. *Bakelite Corporation*, 17 CCPA 494, 504, T.D. 43964, 39 F. 2d 247, 255, *cert. denied*, 282 U.S. 852 (1930). Thus, it was not necessary for all six of its members to participate in any given meeting in order for the Commission to take valid action. As for what constituted a quorum, Congress expressly provided that a majority of the Commission—four—was sufficient. See 19 U.S.C. 1330(c). In so providing, Congress merely codified the common law on the matter which, before enactment of 19 U.S.C. 1330(c), had been applied to the Tariff Commission. See, e.g., *Frischer*, *supra*, 17 CCPA at 504, 39 F. 2d at 255. See also *FTC* v. *Flotill Products*, 389 U.S. 179, 183–4 (1967), as to the common-law rule.

Prior to 1958, a majority of the quorum could render a valid determination on behalf of the Commission. As the court in *Frischer* stated, "[i]n the absence of statutory restriction the general rule is that a majority of a council or board is a quorum, and the majority of the quorum can act." 17 CCPA at 505, 39 F. 2d at 255.

In 1958, Congress modified the rule in *Frischer* as it related to injury determinations in dumping investigations by amending 19 U.S.C. 160(a) to provide, in relevant part, as follows:

> * * * For the purposes of this subsection, the said [Tariff] Commission shall be deemed to have made an affirmative determination [of injury] *if the Commissioners of the said Commission voting* are evenly divided as to whether its determination should be in the affirmative or in the negative. [Emphasis added.]

Thus, by the 1958 amendment Congress provided that an equally divided vote, by "the Commissioners * * * voting," on the question of injury in a dumping investigation, would be deemed an affirmative determination by the Commission.

The short of the matter is that on April 20, 1972, when the Tariff Commission voted on the question of injury, if a quorum of the

Commission was present, an evenly divided vote on the question of injury would result, by operation of law, in an affirmative determination of injury.

Against this background, it is clear that on April 20, 1972, when the Tariff Commission voted on the question of injury, more than a sufficient number of Commissioners were present—five—to constitute a quorum of the Commission. Four Commissioners actually cast their votes on the question of whether injury to an industry was resulting from the importation of asbestos cement pipe from Japan. One additional member who attended the meeting did not participate in the vote. Thus, it is clear that the number of Commissioners present was more than sufficient to permit the Commission to act. Moreover, it is equally clear that pursuant to the 1958 amendment, an affirmative determination of injury was reached on April 20, 1972 since two Commissioners voted affirmatively and two Commissioners voted negatively. The unambiguous language of 19 U.S.C. 160(a), as amended in 1958, provides that an affirmative determination of injury occurs when the Commissioners "voting" are evenly divided. And this is precisely what occurred on April 20, 1972.

Nor does the fact that one Commissioner was present but did not vote affect the validity of the determination of injury. A quorum would have been present even if this Commissioner had been absent from the meeting. Moreover, 19 U.S.C. 160(a) refers to an even division of the Commissioners "voting," not an even division of the Commissioners present. Since there was in fact an even division of Commissioners voting on April 20, 1972, an affirmative finding of injury resulted as a matter of law.

However, as previously observed, plaintiff maintains that the Commission's decision by "equal division was achieved by the knowing and willful abstention from voting by * * * [one Commissioner] otherwise participating in the proceedings [and] was *ultra vires* and, therefore, null and void because the Tariff Commission exceeded its statutory authority by entertaining the abstention of a participating commissioner in order to achieve an affirmative determination when his vote would have materially affected the outcome of the proceeding and the nature of the final determination." From the foregoing, it appears that what plaintiff is arguing is this: Since he was present at the meeting when a vote was taken, the fifth Commissioner had an absolute duty to cast a numerically tie-breaking vote; in view of the fact that he failed to do so, the Tariff Commission acted improperly. Stated otherwise, what plaintiff is contending is that the statutory tie-breaking provision in 19 U.S.C. 160(a) can apply only when either four or six members of the Commission are present at a meeting where action is taken, and when all have voted and are equally

divided. There can be, in plaintiff's view, no justifiable reason for a Commissioner to decline to participate in a vote.

The difficulty with plaintiff's contention is that it finds no support in the language of 19 U.S.C. 160(a) or any other portion of the statute. Neither 19 U.S.C. 160(a) nor any other statutory provision requires a Commissioner who is present at a meeting to vote on every issue presented for decision. Further, 19 U.S.C. 160(a) by its terms provides for an affirmative determination "if *the Commissioners* of the said [Tariff] Commission *voting* are evenly divided * * *." (Emphasis added.) This language clearly looks only to the Commissioners who actually participate in the vote on a given question; it is unconcerned with the number of Commissioners who happen to be present at a meeting when a vote is taken. Plaintiff is attempting to read into 19 U.S.C. 160(a) a precondition to the operation of the "evenly divided" provision which Congress has manifestly not required.

Also without merit is plaintiff's further argument that the fifth Commissioner present at the meeting was obligated to vote and that his abstention from voting made the Commission's determination *ultra vires*. The facts are simply that for whatever his reason this Commissioner did not participate in the vote and in so doing exercised a legally permissible right. See, e.g., *Greater Boston Television Corporation* v. *Federal Communications Commission*, 444 F. 2d 841, 861 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *Robert's Rules of Order* (7th ed. 1970) § 44, p. 344. The point is that nonparticipation of a member of a Commission does not affect the action of the Commission as long as a statutorily sufficient number of Commissioners are present to constitute a quorum. *Ibid.*

There is the further consideration that in enacting 19 U.S.C. 160(a) in 1958, Congress stated that one of its objectives was "to provide for greater * * * speed, and efficiency in * * * [the Antidumping Act's] enforcement * * *." S. Rep. No. 1619, 85th Cong., 2d Sess. (1958), Vol. 2, U.S. Code Cong. & Ad. News (1958), p. 3499. But this objective would be clearly thwarted if the "evenly divided" provision were given the construction which plaintiff is urging, namely, that the provision can apply only when either four or six members of the Commission are present at a meeting where action is taken and all have voted and are equally divided. It is apparent that under plaintiff's construction of the statute, a finding of injury would have been valid under 19 U.S.C. 160(a) if only four Commissioners had been present and had voted on April 20, 1972. Thus, even under plaintiff's theory, a valid determination of injury could have been made had the fifth Commissioner simply absented himself from the entire meeting. The effect of plaintiff's construction of the statute would then be to encourage Commissioners who honestly could not decide an issue to refrain from attending a meeting, even though other issues were

scheduled for discussion, for fear that their mere presence would result in an invalid decision by the Commission as a whole. It is obvious that such a result would be wholly inconsistent with the desire of Congress to encourage speed and efficiency in the Commission's work.

Further, plaintiff argues (as previously set forth) that "the Tariff Commission and the Secretary of the Treasury have each violated the procedures required of notice and reporting by 19 U.S.C. 160(b) because said notice and report of the Tariff Commission's Determination of Injury states that said affirmative determination was achieved because * * * [one Commissioner] 'did not participate in the determination' when, in fact, he was present, and participating in the proceeding wherein the Determination of Injury was affectuated [*sic*], * * *." [5]

The statutory language which plaintiff contends has been violated is 19 U.S.C. 160(a) (rather than 19 U.S.C. 160(b), as incorrectly stated by plaintiff). This provision, 19 U.S.C. 160(a), reads in part:

> Whenever the Secretary of the Treasury (hereinafter called the "Secretary") determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States Tariff Commission, and the said Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured * * *. *The said Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice * * * of his determination and the determination of the said Commission.* * * * [Emphasis added.]

It is clear that the above procedures have been lawfully followed. As already indicated, the Tariff Commission made a valid affirmative determination of injury in the dumping investigation it conducted. In TC Publication 483, *supra*, note 5, the Commission notified the Secretary of the Treasury of this determination. On June 26, 1972, the Assistant Secretary of the Treasury, on behalf of the Secretary of the Treasury, published in the Federal Register a notice in which he referred to the Tariff Commission's determination, as well as to the Secretary of the Treasury's own determination, of sales or likelihood of sales of less than fair value. The notice concluded with the following language (37 Fed. Reg. 12727 (1972)):

> On behalf of the Secretary of the Treasury, I hereby make public these determinations, which constitute a finding of dumping * * *.

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[5] The excerpt from the report of the Tariff Commission to which plaintiff refers is contained at page 2 of the Commission's *Determination of Injury in Investigation No. AA1921-91 Under the Antidumping Act, 1921, as Amended*, TC Publication 483 (May 1972), also published in 37 Fed. Reg. 9267 (1972).

Given the above-quoted language of 19 U.S.C. 160(a), it must be concluded that plaintiff's allegations of violations by the government are groundless; proper procedures were manifestly followed.

Plaintiff, however, contends that the procedures were illegal on the ground that TC Publication 483 did not recite the fact that, although he was present at the meeting the fifth Commissioner did not participate in the voting on April 20, 1972. But this contention again ignores the distinction between Commissioners voting and Commissioners attending a meeting where a vote is taken, as those concepts relate to valid determinations by the Commission. Obviously, from what has been said, it is *voting* that constitutes participation in a Commission determination under 19 U.S.C. 160(a). When this is recognized, the difficulty with plaintiff's argument is readily apparent.

One last matter remains. At a previous stage in the proceeding, the court denied both plaintiff's motion for summary judgment and defendant's cross-motion for partial summary judgment; ordered that the case be remanded to the International Trade Commission so as to allow that agency to consider once again by way of a new vote, the injury question; ordered that the case be stayed until the vote by the Commission was had; and directed that the court be apprised by defendant's counsel within 120 days of the results thereof. Thereafter, the court was advised that the Commission had chosen to stand by its original vote and corresponding determination on injury and that the agency continued to believe that its original vote was valid and that a new vote should not be taken.

In this setting, plaintiff insists that defendant is collaterally estopped from arguing the validity of the Commission's injury determination. This argument is grounded on the premise that implicit in the court's order remanding the case to allow the Commission to reconsider the issue of injury by way of a new vote was a decision by this court that the Commission's determination was invalid. The fact is, however, that the court's order neither expressly nor by implication decided the issue of the validity of the Commission's injury determination. To the contrary, the express terms of the order support the opposite conclusion. For the court denied both plaintiff's motion for summary judgment and defendant's cross-motion for partial summary judgment. In addition, the court stayed the proceedings.

In these circumstances, the denial of the parties' motions regarding the question of validity means that the court made no finding as to such question. Furthermore, the stay placed this case in abeyance, and the court reserved its decision regarding the issue of validity.[6]

[6] Parenthetically, it is to be observed that while not set forth in the court's order, the remand and stay were motivated in major part by the court's desired to avoid needless judicial controversy. For on remand had all members of the Commission voted on the injury question or had the fifth Commissioner actually voted, all controversy as to the validity of the injury determination would have been avoided.

Thus, the issue of validity of the Commission's original determination is now before the court again. As the plaintiff stated, citing *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 372 (1939), the Commission having failed to act on the remand, the court can proceed with its consideration of the motions before it. It is not precluded from doing so either by estoppel or by the "law of the case." The failure of the Commission to vote again merely returns the parties to the *status quo* prior to the remand.

In view of the foregoing, defendant's motion for partial summary judgment as to plaintiff's first course of action is granted and plaintiff's cross-motion for summary judgment is denied.

(C. D. 4699)

ED ALEXANDER *v.* UNITED STATES

Nylon tennis string

It is established that, in the condition imported, the nylon string consists of two precut lengths of string contained in a plain see-through plastic or cellophane bag bearing only one mark that reads "Made in Japan." Plaintiff testified that in the bulk lots imported the nylon string was sold to manufacturers of racket frames, and further stated that it was not his business to know, and he did not know what the manufacturers did with the imported nylon string.

For tariff purposes, racket strings that are parts of lawn-tennis equipment include only such as are "put up and packaged for retail sale" in small quantities for ultimate consumers. *Lyons Export & Import, Inc.* v. *United States*, 65 Cust. Ct. 394, 398, C.D. 4111 (1970), *aff'd*, 59 CCPA 142, C.A.D. 1056, 461 F. 2d 830 (1972).

HELD. Plaintiff, claiming that the imported nylon string is classifiable as parts of lawn-tennis equipment, failed to establish that, in the condition imported, the nylon string was put up and packaged for retail sale in small quantities to ultimate consumers and failed to overcome the presumption that the nylon string was properly classified under TSUS item 389.60.

Court No. 76-3-00648

Port of Los Angeles

[Judgment for defendant.]

(Decided May 31, 1977)

Glad, Tuttle & White (*Edward N. Glad* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section, and *Sidney N. Weiss*, trial attorney), for the defendant.

LANDIS, Judge: This action involves the classification of merchandise invoiced as "nylon tennis string." Plaintiff imported the nylon string from Japan in November 1974.

Pursuant to the Tariff Schedules of the United States (TSUS) a customs import specialist at the Los Angeles district port of entry classified the nylon string as man-made fiber, not specially provided for, dutiable under item 389.60 of TSUS, schedule 3, part 7, subpart B.

Plaintiff claims that the nylon string is properly classifiable as parts of lawn-tennis equipment, specially provided for in TSUS schedule 7, part 5, subpart D, and dutiable under item 734.88.

Nylon string classified under TSUS item 389.60 is dutiable at 25 cents per pound plus 15 per centum ad valorem. Plaintiff paid that duty rate to obtain release and delivery of the nylon string from customs custody. Nylon string assessed under TSUS item 734.88 is dutiable at only 4 per centum ad valorem. Should plaintiff prevail in this action he is entitled to a refund of the difference in the duty rates.

The pertinent context of the disputed TSUS classifications, items 389.60 and 734.88, is as follows:

As classified:

	Articles not specially provided for, of textile materials:	
	Lace or net articles, whether or not ornamented, and other articles ornamented:	
	* * * * * * *	
	Other articles, not ornamented:	
	* * * * * * *	
	Of man-made fibers:	
* * *	Knit * * *----------	* * *
* * *	Pile * * *----------	* * *
389.60	Other----------	25¢ per lb. +15% ad val.

As claimed:

	Lawn-tennis equipment, and parts thereof:	
* * *	Balls----------	* * *
	Rackets, whether or not strung:	
* * *	Not strung----------	* * *
* * *	Strung----------	* * *
734.88	Other----------	4% ad val.

TSUS, schedule 3, part 1, in a subpart E headnote, leavens the above classifications *inter alia*, providing as follows:

Subpart E headnotes:

1. The provisions of this subpart do not cover—

* * * * * * *

(ix) racket strings put up and packaged for retail sale (see part 5D of schedule 7) * * *

* * * * * * *

2. (a) For the purposes of the tariff schedules, the term "*man-made fibers*" refers to the filaments, strips, and fibers covered in this subpart. [Emphasis quoted.]

* * * * * * *

It has been stated by this court in effect that, for tariff purposes, racket strings that are parts of lawn-tennis equipment include only such as are "put up and packaged for retail sale." *Lyons Export & Import, Inc.* v. *United States*, 65 Cust. Ct. 394, 398, C.D. 4111 (1970), affirmed on appeal in an opinion decision written by Judge Re (now Chief Judge) of this court sitting by designation as a member of the Court of Customs and Patent Appeals, 59 CCPA 142, C.A.D. 1056, 461 F. 2d 830 (1972). In the condition imported, the nylon string in this case was cut to specific lengths and packaged. Plaintiff contends that in the condition that it was cut to specific lengths and packaged, the imported nylon string was put up and packaged for retail sale in lengths sufficient to string one tennis racket. Defendant, citing *Lyons Export & Import, Inc.* v. *United States*, *supra*, *inter alia*, argues that the evidence is insufficient to support the fact that the imported nylon string was put up and packaged for retail sale in lengths sufficient to string one tennis racket.

The record consists of testimony from Edward Alexander, the plaintiff, and testimony of William R. Johns, a witness for defendant. There are eight exhibits, three for plaintiff (exhibits 1, 2 and 3) and five for defendant (exhibits A, B, C, D and E). The official customs entry papers are also in evidence.

It is established beyond dispute that, in the condition it was imported, the nylon string consists of two precut lengths of string contained in a plain see-through plastic or cellophane bag bearing only one mark that reads "Made in Japan." The closure of the bag is stapled. Entry No. 836707, identified with this action, covers 10,000 such bags, packed in four cases (2,500 to a case), each bag containing two strings precut to a length that measures 14 feet 3 inches.[1] The remaining entry in this action, No. 836708,[2] covers 20,000

[1] Defendant contends that two strings, each measuring 14 feet 3 inches, are not enough to string a tennis racket.

[2] This action originally included three customs entries numbered 836707, 836708, and 833847. On trial, plaintiff abandoned the action as to entry No. 833847.

such bags, packed in eight cases (2,500 to a case), each bag containing two precut lengths of string, one measuring 16 feet 3 inches, and one measuring 14 feet 2 inches.[3] On trial, plaintiff identified samples of the nylon string, packaged as described above, and imported under entry Nos. 836707 and 836708 (exhibits 1, 2 and 3). The samples were received in evidence without objection.[4]

Plaintiff testified that the 10,000 packages covered by entry No. 836707 (exhibits 1 and 2) were sold, in the condition imported, to two manufacturers, identified as Leach, Inc. and P.D.P. (Professional Design Products); that he sold the 20,000 packages covered by entry No. 836708 to Wilson Sporting Goods; that the different lengths are precut to his purchasers' specifications for tennis rackets of different head size; that two strings in the lengths packaged and imported are enough to string one tennis racket, and that some tennis rackets require longer lengths. He was, said plaintiff, familiar with racquetball rackets and squash ball rackets; that tennis string had a higher tensile strength than string for racquetball rackets or squash rackets, and because the lower the tensile, the less expensive the string, it would make no sense to use high tensile string in racquetball rackets or squash rackets. In substance, he testified that the imported packaged string is tensiled for tennis rackets and not for racquetball or squash rackets.

On cross-examination, plaintiff stated that Leach made plastic tennis rackets and racquetball rackets, but he acknowledged that the racket string sold to Leach in this case was after Leach had discontinued making tennis rackets. He surmised that Leach probably had a large inventory of tennis racket frames to be strung with the nylon string plaintiff sold them. P.D.P., plaintiff said, makes tennis rackets and does not make racquetball rackets. Wilson Sporting Goods makes tennis rackets. For all that, when asked what the manufacturers

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[3] Defendant contends that there is no evidence that, in the condition imported, the strings are put up and packaged for retail sale.

[4] Defendant in Point 1 of its brief argues that plaintiff has not proved the identity, i.e., number of nylon strings contained in the packages covered by active entries 836707 and 836708. In support, defendant relies on plaintiff's pretrial interrogatories (exhibit A) where plaintiff stated that some packages of precut nylon string "come imported" in packages containing enough string to string one racket, and that two packages each containing 100 pieces of string cut in varying lengths will string 100 rackets; also that approximately 25% of the importations involve packages containing enough string to string one racket, and approximately 75% involve packages containing enough string for 100 rackets. Based on those percentages, defendant postures that the packages imported under entry Nos. 836707 and 836708 must include packages containing 100 strings and that plaintiff has failed to identify them with either entry.

Defendant cross-examined plaintiff on the point and plaintiff explained that this was his first time in court and that his statements in response to the interrogatories reflected his general import business in all packaged nylon string and not the packages covered by the active entries in this case which contain two strings. enough to string one racket. Trial testimony can properly explain statements made in response to pretrial interrogatories. Since defendant did not object to the samples admitted in evidence (exhibits 1, 2 and 3) as representative of the nylon string imported in connection with entries 836707 and 836708, the identity of the imported nylon string in packages containing two precut lengths of string is established by the samples. Defendant offered no evidence to the contrary.

do with the nylon string, plaintiff testified: "I don't know what they do with the string. I do not know what they do with the string after they get it. That is not my business." [5]

Defendant's witness, Mr. William R. Johns, testified that he operates a retail sports store in Los Angeles. He stated that his store specializes to the extent that 90% of the business is in racket sports and, of that, 60% has to do with stringing rackets. It is Mr. John's testimony that most tennis string is sold at retail in conjunction with stringing a customer's racket, using two hydraulic stringing machines; that plaintiff's exhibit 3 (two strings, one 16′3″ and one 14′2″) is enough to string one tennis racket; that he doubts that plaintiff's exhibits 1 and 2 (two strings in each, both measuring 14′3″) are enough to string a common tennis racket, but the strings are appropriate to string racquetball and squash rackets; that very rarely does a customer come into his store and ask for tennis string; that if a customer should ask for tennis string, he sells it in packaged form, if available, otherwise he cuts a length of 33 to 35 feet off a large roll for the customer and that he has never seen or sold string, packaged or otherwise, in two lengths of 14′3″ each, or for that matter in two lengths, one 16′3″, the other 14′2″. Mr. Johns further testified that he has seen retail packages containing tennis string, most commonly in 33-foot lengths and 22 feet in combination with 11 feet, and identified brand name packaged tennis string in 35-foot length (exhibits C and D) and 34-foot length (exhibit E).

On cross-examination, Mr. Johns testified that the amount of string needed to string a tennis racket differs depending on the model that is being strung. It is possible that there are models that require two strings of the same length for the main vertical strings and the cross strings of a racket. Professional Design Products (P.D.P.) manufactures three models of tennis rackets and Mr. Johns stated that, as yet, he has had no occasion to string the smallest model which is prestrung in the factory. It is possible, he said, that P.D.P. makes a tennis racket that takes two strings of the same length, but he did not know for certain. He was familiar with the P.D.P. junior rackets but had no experience stringing them and could not say how much string they would need to string them.

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[5] At the close of Mr. Alexander's testimony plaintiff rested his case and defendant, on motion in open court, immediately proceeded to offer in evidence, as part of the official record, "all three entries and all the court papers." The papers were admitted in evidence without objection. Following the receipt of said evidence, on motion pursuant to rules 8.3(c) and 8.3(d) of the rules of this court, defendant asked the court to dismiss plaintiff's action for failure to prove a *prima facie* case. Plaintiff opposed the motion. Ruling on the motion was reserved, and counsel directed to brief the motion together with the merits of this action. Defendant having proceeded to offer evidence prior to making the motion is deemed to have waived the motion, and it is denied. See, *A. & N. Club, etc.* v. *Great American Insurance Company*, 404 F. 2d 100, 103 (6th Cir. 1968); *Wealden Corporation, et al.* v. *Schwey, et al.*, 482 F. 2d 550, 551 (5th Cir. 1973); 5 *Moore's Federal Practice*, section 41 13 [1] at 1149, discussing principle that motion to dismiss at the close of plaintiff's evidence is waived if defendant proceeds with its case before the court rules on the motion.

When questioned by plaintiff about his sales for tennis string to take out, Mr. Johns' testimony was as follows:

> Q. Mr. Johns, how often does it happen that you have a customer that just buys the tennis string?—A. Very rarely.
> Q. How rare is rare?—A. A dozen times a year at the most.
> Q. And how many tennis racquets do you sell during a year's time?—A. Well, in the area of thousands.
> Q. And how many tennis racquets would you say you restring during a year's time?—A. Well, if we average 25 a day, 25 times six is 150, so 150 times 52.

On the merits, defendant points out that the evidence establishes that plaintiff sold the racket strings in this case in the bulk lot imported only to manufacturers. Relying on the *Lyons* case, *supra*, defendant postures that the TSUS language "put up and packaged for retail sale" requires evidence that the package is sold at retail to the ultimate consumer. Plaintiff contends that the *Lyons* case does not even support, much less hold, that the classification of tennis string requires that the string be sold at retail to the ultimate consumer. *Lyons*, according to plaintiff, supports the customs administrative view [6] that tennis string, imported in lengths required for stringing one tennis racket, is properly classifiable under the provision for lawn-tennis equipment and parts thereof in TSUS item 734.88. Plaintiff thus concludes that, in terms of the TSUS limitation on the classification of racket string, the headnote merely requires that, in the condition imported, the racket string is put up and packaged for retail sale.

The *Lyons* case, relied on by defendant, involved tennis string in coils 660 feet in length, wound on plastic reels, and shown to be sold to sporting goods dealers and the tennis professional. Factually it was not, in that form and condition, "put up and packaged for retail sale" because as this court stated it "would be unreasonable to assume, without evidence, that a reel 660 feet—enough to string about 20 tennis rackets—is a retail package." *Lyons*, *supra* (65 Cust. Ct., p. 399). On appeal, the appeals court examined the various lexicographic definitions of the terms "retail" and "retail sale." In determining the meaning of those terms, the appeals court, found that sales at retail are commonly viewed as sales in small quantities to ultimate consumers, and stated as follows:

> Bearing the foregoing in mind, it cannot be said that the court below erred in concluding that only tennis string put up and packaged for sale in small quantities for ultimate consumers was to be classified as lawn-tennis equipment, and parts thereof.
>
> An examination of the record reveals that, at the trial, appellant succeeded in showing only that Elascord is sold to "sporting

[6] See T.D. 56502(38), 100 Treas. Dec. 632, and T.D. 66-157(18), 101 Treas. Dec. 436.

goods dealers and the tennis professional." It did not prove that these were sales to the ultimate consumer. Consequently the Customs Court could not have found that the merchandise consisted of "racket strings put up and packaged for retail sale." Therefore, since it cannot be said that the Customs Court erred on the evidence before it, we affirm. [59 CCPA 142, 145, C.A.D. 1056, 461 F. 2d 830, 832 (1972).]

Upon weighing and considering the testimony adduced on this record, I conclude that plaintiff has failed to establish that the racket string is put up and packaged for retail sale. Plaintiff's testimony merely establishes that the racket string was sold by him to manufacturers. Beyond that plaintiff did not know what they did with it. Plaintiff's testimony is plainly not evidence that the racket string was put up and packaged for retail sale. Defendant's witness testified that, in his tennis retail business, he used almost all his tennis string for restringing tennis rackets using hydraulic machines; "very rarely" did he sell tennis string to take out, a "dozen times a year at the most." Such testimony obviously does not cure plaintiff's own failure to show that the racket string imported in this case was put up and packaged for retail sale. If the evidence can be said to prove anything, it is that the imported racket string was not put up and packaged for retail sale because it was sold to manufacturers of rackets for a purpose not disclosed in this record. There is not a scintilla of evidence that the imported string was put up for retail sale. If in fact it was put up for retail sale, I cannot perceive why evidence was not introduced to that effect. On this record, the question is left open and the court "may not properly supply from imagination the essentials in which the proofs are deficient." *United States* v. *Malhame & Co.*, 19 CCPA 164, 171, T.D. 45276 (1931). Plaintiff has not overcome the presumption that the nylon string was properly classified under TSUS item 389.60, *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970).

The action is, accordingly, dismissed. Judgment will so enter.

(C.D. 4700)

CARMICHAEL INTERNATIONAL SERVICE *v.* UNITED STATES

Wigs

EXPORT VALUE—SUCH MERCHANDISE

Imported merchandise was appraised on the basis of export value based on prices for *similar* merchandise. Plaintiff claimed that while export value was the proper basis of appraisement, the correct export values were represented by the actual prices paid to the manufacturer of *such* merchandise, as set forth in the invoices. Under

the statutory provisions covering export value, consideration must be given to the value of "such" merchandise, i.e. identical merchandise produced by the same manufacturer, before consideration can be given to the value of "similar" merchandise. Thus, in the present case, plaintiff had the burden, among other things, of proving that merchandise made by the same producer which was identical to the merchandise in question was freely sold or offered for sale for exportation to the United States at prices equal to the invoice prices. Plaintiff, however, failed to meet this burden and the appraised values are affirmed.

Court Nos. R70/9113, etc.

Port of Los Angeles

[Judgment for defendant.]

(Decided June 9, 1977)

Stein, Shostak, Shostak & O'Hara, Inc. (*Marjorie M. Shostak* and *Theo B. Audett* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

MALETZ, Judge: These eight consolidated cases involve the proper dutiable values of certain wigs and other human hair pieces which were sold in Hong Kong for exportation to the United States by Croset & Company, Ltd. of Hong Kong. The merchandise covered by seven of the eight cases was exported from September 1964 through November 1965 and entered at the port of Los Angeles during the same period by Carmichael International Service (Carmichael) for the account of the M. Calig Company of Los Angeles. The merchandise covered by the eighth case was exported in November 1965 and entered at the port of Los Angeles in the same month by Carmichael for the account of the Hong Kong Trading Corporation of Los Angeles.

The imported merchandise was appraised by the government on the basis of export value as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, based on prices for *similar* merchandise. Plaintiff agrees that export value is the correct basis of the appraisement, but contends that the correct export values are represented by the actual prices paid to the manufacturer for *such* merchandise, as set forth in the invoices.

THE STATUTE

Section 402 of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 (19 U.S.C. 1401a) provides as follows:

(b) Export value.

For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at

which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

* * * * * * *

(f) Definitions.

For the purposes of this section—

(1) The term "freely sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—

(A) to all purchasers at wholesale, or

(B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,

without restrictions as to the disposition or use of the merchandise by the purchaser, except restrictions as to such disposition or use which (i) are imposed or required by law, (ii) limit the price at which or the territory in which the merchandise may be resold, or (iii) do not substantially affect the value of the merchandise to usual purchasers at wholesale.

(2) The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise undergoing appraisement, have been normal in the trade under consideration with respect to merchandise of the same class or kind as the merchandise undergoing appraisement.

* * * * * * *

(4) The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which export value, United States value, or constructed value, as the case may be, can be satisfactorily determined:

(A) The merchandise undergoing appraisement and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, the merchandise undergoing appraisement.

(B) Merchandise which is identical in physical characteristics with, and was produced by another person in the same country as, the merchandise undergoing appraisement.

(C) Merchandise (i) produced in the same country and by the same person as the merchandise undergoing appraisement, (ii) like the merchandise undergoing appraisement in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to the merchandise undergoing appraisement.

(D) Merchandise which satisfies all the requirements of subdivision (C) except that it was produced by another person.

* * * * * * *

The Issue

The question presented is whether plaintiff has proven by a preponderance of the evidence that its claimed values, i.e. the invoice prices, represent the proper dutiable values of the importations in question. This, in turn, depends on whether plaintiff has established that "such" merchandise, i.e. merchandise identical to the merchandise in question, was freely sold or, in the absence of sales, freely offered for sale, in the ordinary course of trade, for exportation to the United States at prices equal to the invoice prices. [1]

The Record

The record consists of (1) an affidavit of Fanny Wan who identified herself as "bookkeeper and secretary" of the Croset company (plaintiff's exhibit 1); (2) the testimony of Milton Calig, president of the Calig company; (3) a letter dated July 9, 1965 from Mr. Calig to the customs appraiser of merchandise at Los Angeles (defendant's exhibit A); (4) a customs agent's report dated December 14, 1965 concerning wigs sold by the Croset company (defendant's exhibit B); and (5) the official papers in the eight cases. In addition, the record in *Majestic Electronics, Inc.* v. *United States*, 63 Cust. Ct. 628, R.D. 11686 (1969) was incorporated on motion by plaintiff and over objection by defendant on the ground that it was immaterial.

Summary of Record

Given the circumstances present here, the action is best understood by summarizing the relevant portions of the record starting with plaintiff's exhibit 1, the affidavit executed by Fanny Wan on September 24, 1970 in Hong Kong. In her affidavit Miss Wan states that during the period January 1, 1964 to December 31, 1965 she was bookkeeper and secretary of the Croset company (Croset); that in that capacity she was fully and personally familiar with all sales and offers for sale made by Croset during that period, involving wigs and other human hair pieces, and with their selling prices; that she was fully familiar with sales of wigs [2] by Croset to the Calig company (Calig); and that all of the sales to Calig consisted entirely of items which were being closed out, or which had been overstocked.

Miss Wan further states in her affidavit that the prices of wigs sold by Croset to Calig varied from time to time, depending upon market

[1] It is undisputed that the principal market of the country of exportation was Hong Kong and that the prices did not vary with quantities sold.

[2] The term "wigs" as used here and hereafter refers to wigs and to other human hair pieces such as wiglets (which are small hair pieces combed into the hair to make it fuller and more stylish) and ponytails (which are placed on the back of the head to give the impression of long hair).

conditions, but that such wigs were at all times freely offered for sale, for exportation to the United States, to anyone wishing to purchase, at the same prices at which they were sold to Calig. Attached to the affidavit are copies of an invoice to Calig and an invoice to Hong Kong Trading Corporation of Hollywood, California, dated November 2 and November 8, 1965, respectively,[3] showing identical prices for various wigs, which the affidavit states truly reflect the prices at which the described merchandise was actually sold and "are representative of the uniform practice of Croset of freely offering and selling such merchandise at the same prices to anyone wishing to purchase."

Miss Wan's affidavit further states that no relationship, corporate, financial, or otherwise, existed between Croset and either Calig or Hong Kong Trading Corporation; that sales to both of those purchasers were in the usual course of business, without any restrictions as to disposition or use; and that it was the uniform practice of Croset, during the period January 1, 1964 to December 31, 1965, to offer and sell all wigs on an f.o.b. Hong Kong basis.

Bearing on the matters covered by Miss Wan's affidavit is Customs Form 5515, the Special Customs Invoice which is included in the official papers for all but two of the entries here involved.[4] This Special Customs Invoice shows "Croset & Company, Ltd." of Hong Kong as the seller. Section IV, column (4) of each such invoice shows the invoice unit price or value, while section IV, column (7) shows the "current unit price for export to United States." In each instance, the amount shown in column (4) and column (7) of section IV is the same. Further, question 4(B) of section V and the "x" answer on each Special Customs Invoice in these cases read as follows:

4. * * *

(B)(1) Have you stated in section IV, column 7, the price at which you are now selling the goods or offering them for sale for export to the United States and whether this price is f.o.b., c.i.f., c. & f., or whatever the fact may be? ☒ Yes ☐ No

(2) Is this price freely offered to anyone who wishes to buy the goods for export to the United States? ☐ Yes ☒ No.

Finally, each Special Customs Invoice contains a "PURCHASE DECLARATION" to the effect that all the information contained in the invoice is true and correct and each declaration bears the signature of Gaston O. Croset who is identified on the commercial invoices and packing lists as the managing director of Croset.

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[3] The invoice to Calig, dated November 2, 1965, is identical to the invoice in Entry No. 105698, Court No. R70/9118. The other invoice to the Hong Kong Trading Corporation, dated November 8, 1965, is identical to the invoice in Entry No. 106090, Court No. R70/9120.

[4] All the official papers in these cases were received in evidence as an unmarked exhibit on motion of counsel for plaintiff.

We turn next to the testimony of Milton Calig who stated that he is the president of M. Calig Company; that during the years 1964 and 1965 he was an importer of human hair wigs, which his company purchased from the Croset company of Hong Kong; and that he commenced dealing with Croset when Mr. Gaston O. Croset visited him in Los Angeles and offered to sell him some wigs for importation into the United States from Hong Kong. In this connection, Mr. Calig's initial purchases were made around August of 1964 on the basis of samples and prices quoted by Mr. Croset in Los Angeles.

Mr. Calig further testified that in the latter part of 1964 he visited Mr. Croset in Hong Kong and purchased wigs; that he also purchased by cablegram, letter and phone; that he did not bargain with Mr. Croset as to the prices, but paid the quoted prices; and that the prices did not vary with the quantity of hair goods purchased.

The witness stated that in the latter part of 1964 when he was in Hong Kong, he was shown by Mr. Croset a price list on Croset's letterhead which set forth the prices of particular wigs according to color,[5] and he was charged the exact prices shown on the price list. He had no personal knowledge as to whether the price list was shown to anyone other than himself.

Mr. Calig further testified that when he visited Croset in Hong Kong, Mr. Croset offered him the wigs at a closeout price;[6] and that the offer included wigs already made, plus wigs Mr. Croset would have made by his contractor, to dispose of a stock of raw hair which he had purchased from the Van Yee Trading Company and which came from Mainland China.[7] Mr. Calig said that Mr. Croset was anxious to dispose of this stock of hair for a number of reasons: first, because he was afraid the hair from Mainland China would shortly be embargoed by the United States government, as it ultimately was; second, that the dyeing was of poor quality, the light colors being green and the blond having a greenish tint; and third, that new modacrylic fibers were soon to come in the market and that while he himself did not become aware of such wigs until the latter part of 1965, he assumed that Mr. Croset knew that as soon as modacrylic fibers became available for wigs, wigs made of human hair would no longer be in demand and that availability of modacrylic

[5] However, as shown by the official papers, the first time Calig was charged for wigs according to *color* commenced with the May 25, 1965 exportations. See Entry No. 113562 in Court No. R70/9117. Prior to that. Croset's sales to Calig were at a "flat" or single price per item regardless of color.

[6] The witness testified that he purchased the wigs from Croset for the next 15 months at closeout prices. It is to be noted, however, that in a letter to Customs dated July 9, 1965 (defendant's exhibit A) Mr. Calig stated that "on the majority of these shipments Croset Company, either sold us a product run at a 'close out' price, or they made a special run on a cheap light weight wig with unprocessed oriental hair for us." At trial, Mr. Calig denied that any of the wigs purchased by his company were specially made for his company.

[7] The record indicates that the wigs in question were fabricated for Croset by the Hong Kong Artificial Wig Manufactory.

fibers would have an effect on the price at which human hair pieces would be offered in Hong Kong in 1964 and 1965.[8]

Mr. Calig indicated that he had no personal knowledge as to how many customers Croset had in 1964 or 1965 nor how much such customers paid for the wigs they bought. He added, however, that he had seen actual invoices covering sales of identical wigs to other buyers at prices identical to the prices paid by him. On one occasion, he recalled that Mr. Croset showed him an invoice of another purchaser's order which contained identical prices to those he was paying. At this time Mr. Croset kept his hand over the other importer's name on the top, but Mr. Calig was able to determine it was the Hong Kong Trading Corporation "because as he was showing it to me his hand lifted off and I noticed Hong Kong Trading Company." Finally Mr. Calig made clear that at no time did he have access to the books and records of the Hong Kong Trading Corporation or of Croset.

Relevant, too, is a report concerning the Croset company, dated December 14, 1965, prepared in Hong Kong by Perry J. Spanos, acting senior customs representative, which is contained in the record as defendant's exhibit B. The report noted that Mr. Croset, the managing director of the Croset company, was interviewed and stated that until March of 1965 handmade wigs were sold to Calig for $11.00 each and machine-made wigs for $6.50 each. After March of 1965 there was a substantial change in price so that handmade wigs, depending on color, were invoiced to Calig from $15.95 to $17.95 each, while machine-made wigs were invoiced from $7.00 to $8.30 each. The report further commented that Mr. Croset indicated there were no business documents pertaining to the instant transactions claiming that (1) the letters and order numbers mentioned on the commercial invoices were imaginary; (2) there were no records kept or invoices issued by the Hong Kong Artificial Wig Manufactory (which, as previously mentioned, manufactured the hair goods for Croset from hair supplied by that firm); and (3) in general, there were no documents available to substantiate the unit values. The report added that Mr. Croset did offer copies of "Cost Calculations" which, it was indicated, could not be substantiated by any business records.

According to the report, the invoiced prices to Calig were extremely low in comparison with substantial quantities of similar wigs exported during 1964–1965 by various other Hong Kong manufacturers to several U.S. importers, in large wholesale quantities, which were at the following *minimum* prices per unit:

1. Hand-made wigs: US$20.00 to US$35.00 depending on color.

[8] In general, according to Mr. Calig, three factors determined the price of a wig: (1) whether it was handmade or machine-made; (2) the weight of the particular hair piece; and (3) the quality of the dye.

2. Machine-made wigs: US$11.50 to US$14.50 depending on color.

The report of the customs representative further noted that the Hong Kong Artificial Wig Manufactory, which fabricated the wigs in question, had been liquidated and that no records were available for examination. However, the report stated that according to the recollection of Chiu Wai Mau, who had been assistant manager of that company, (1) Croset supplied the hair to his firm already bleached and dyed as well as the netting; and (2) all wigs for Croset were manufactured according to specifications and a prearranged color scheme combination and there never were any "seconds" or "discontinued styles" or "close-out" merchandise involved.

OPINION

As previously mentioned, the imported merchandise was appraised by the government on the basis of export value based on prices for *similar* merchandise. However, under the language of section 402(f)(4), *supra*, consideration must be given to the statutory value of *"such"* merchandise, i.e. identical merchandise produced by the same manufacturer,[9] before consideration can be given to the statutory value of *"similar"* merchandise. See, e.g., *Schieffelin & Co.* v. *United States*, 71 Cust. Ct. 209, 214–15, A.R.D. 317, 360 F. Supp. 1386, 1390–91 (1973), *aff'd* 62 CCPA 7, C.A.D. 1135, 504 F. 2d 1147 (1974); Sturm, *A Manual of Customs Law* at 54–55 (1974). Thus, plaintiff had the burden of proving that merchandise made by the same producer which was identical to the merchandise in question was freely sold or, in the absence of sales, freely offered for sale, in the ordinary course of trade, for exportation to the United States at prices equal to the invoice prices. Should plaintiff meet this burden it would not have to disprove the correctness of export value for "similar" merchandise since under the statutory priorities mandated by section 402(f)(4) the latter would not apply.

In this setting, we consider first whether plaintiff has proven that "such" merchandise was freely sold to all purchasers for exportation to the United States at prices equal to the invoice prices. On this aspect, there is no competent evidence to establish that the imported wigs were freely *sold* to all purchasers at the invoice unit values. For one thing, Mr. Calig was not competent to testify as to the prices at which *Croset* freely sold his merchandise. The fact that Mr. Calig may have seen a few purported invoices which charged the same prices charged to Calig for identical merchandise cannot establish that the same prices were charged to all. At most, Mr. Calig's testimony shows

[9] Plaintiff has not contended that an export value exists for merchandise identical to the imported merchandise but manufactured by a different manufacturer.

that some U.S. purchasers other than Calig were charged the same prices. What is more, Mr. Calig was able to see (and then only furtively) only one of the purported purchasers' names, i.e. that of the Hong Kong Trading Corporation. And with specific respect to the Hong Kong Trading Corporation, it is hardly determinative that some of the merchandise was invoiced to that company at the same prices as to Calig.[10]

Further, Fanny Wan's unsupported statement that the copies of the invoices to Calig and to Hong Kong Trading Corporation, showing identical prices for various wigs, reflect the prices at which the merchandise was actually sold and "are representative of the uniform practice of Croset of freely offering and selling such merchandise at the same prices to anyone wishing to purchase" certainly cannot be considered as probative evidence that "such" merchandise was freely sold to *all* purchasers for exportation to the United States at the same price.[11] Indeed, there is no evidence that anyone else "wished" to buy at the prices charged to Calig.

Beyond this, plaintiff contends that Fanny Wan's affidavit and Mr. Calig's testimony establish that the imported merchandise was freely offered for sale to all purchasers for exportation to the United States at prices equal to the invoice prices. For the reasons that follow, the court cannot agree with this argument.

In the first place, Gaston O. Croset, the managing director of the Croset company, quoted the prices for the merchandise to Calig and personally signed all the invoices and packing lists in these consolidated actions. Thus, as the managing director of the seller he was clearly the person most competent and qualified to testify regarding Croset's sales practices, sales prices, and offers for sale. Yet, Mr. Croset was never called to testify, nor was his affidavit offered into evidence. These facts support an inference that Mr. Croset's testimony would have been unfavorable to plaintiff. See, e.g., McCormick, *Handbook of the Law of Evidence* § 249, at 533–34 (1954).

Secondly, as previously observed, on the Special Customs Invoices, moved into evidence by plaintiff along with the other official papers, in reply to question 4(B)(2) Mr. Croset specifically indicated that the

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[10] As seen from the official papers, Hong Kong Trading Corporation did not pay $11.00 or $6.50 per wig, or $1.50 or $2.50 per hair piece or wiglet which were the prices charged to Calig through March 8, 1965. Nor did the Hong Kong Trading Corporation pay $7.00, $7.55, $8.30, $9.20, $15.95, $16.80 or $17.95 per wig. Yet these were some of the prices charged to Calig commencing with the May 25, 1965 exportation. Moreover, there is no proof that the Hong Kong Trading Corporation ever imported any hair goods other than those covered by Entry No. 106090 in Court No. R70/9120. Since this merchandise was sold for exportation subsequent to Calig's merchandise, its price cannot be used to determine the export value for Calig's merchandise. See *Spanezico, Inc.* v. *United States*, 75 Cust. Ct. 123, C.D. 4616, 405 F. Supp. 1078 (1975), *aff'd* 64 CCPA 6, C.A.D. 1176, 542 F. 2d 568 (1976); *B & W Wholesale Co., Inc.* v. *United States*, 63 Cust. Ct. 691, 697–98, A.R.D. 262 (1969), *aff'd* 58 CCPA 92, C.A.D. 1010, 436 F. 2d 1399 (1971).

[11] Miss Wan's affidavit and the weight to be given to it are discussed in some detail in a later part of this opinion.

invoice unit prices *were not* freely offered to anyone who wished to buy the foods for export to the United States. At no time did the plaintiff attempt to explain away this statement by Mr. Croset. Instead, plaintiff's rebuttal on this point lies in the uncorroborated statement in Fanny Wan's affidavit to the effect that the wigs in question were at all times freely offered for sale for exportation to the United States, to anyone wishing to purchase, at the same prices at which they were sold to Calig.

Miss Wan's assertions about transactions which took place five years earlier are unsupported by any reference to books of account, price lists, letters, or other documents except for the two invoices attached to the affidavit. Thus, her affidavit suffers from the same deficiencies as the affidavit in *Andy Mohan, Inc.* v. *United States*, 74 Cust. Ct. 105, 114, C.D. 4593, 396 F. Supp. 1280, 1287–88 (1975), *aff'd* 63 CCPA 104, 107, C.A.D. 1173, 537 F. 2d 516, 518 (1976), and is entitled to little weight. In fact, she even fails to allege that at the time of executing the affidavit she was in possession of any of Croset's books, records, or other documents (except for the two invoices) which enabled her to reach the conclusions set forth in her affidavit. As the appellate court stated in *Andy Mohan*, *supra*, 63 CCPA at 107, 537 F. 2d at 518:

> Evidence should be assessed "in practical terms, considering such factors as completeness, adequacy of bases, and possible motives to deceive," rather than on the basis of artificial distinctions between ultimate and evidentiary facts. *Mannesmann-Meer, Inc.* v. *United States*, * * * [58 CCPA 6, C.A.D. 995, 433 F. 2d 829 (1970)].

Against this background, it is apparent that Miss Wan's affidavit is incomplete, inadequately based, insufficiently supported by records, and in flat contradiction to Mr. Croset's declarations in the Special Customs Invoices.

Finally, Mr. Calig testified that Mr. Croset showed him a price list in the latter part of 1964, which price list set forth the prices of particular wigs according to color and that the prices charged to Calig were the prices set forth in the price list. However, Miss Wan makes no mention of such a price list; Mr. Calig had no knowledge that the price list was ever shown to anyone other than himself; and Croset clearly did not follow such a price list in the latter part of 1964 or first part of 1965 because Calig was not charged prices depending on color until the May 25, 1965 exportations. But even if such a price list existed, there is no showing as to the time when it was in effect or that any offers were ever based on it, much less that all offers were based on it.

In sum, it is clear that the record fails to establish that "such" merchandise was freely sold or offered for sale to all purchasers for

exportation to the United States at the same prices, i.e. the invoice unit prices. It is thus evident that plaintiff has failed to prove that its claimed values, i.e. the invoice prices, represent the proper dutiable values of the importations in question.[12] Therefore the appraised values are affirmed and judgment will be entered accordingly.

(C.D. 4701)

INTERNATIONAL FASHIONS *v.* UNITED STATES

Ladies sweaters

ORNAMENTATION—SAMPLE EVIDENCE WITHOUT TESTIMONIAL SUPPORT

Ladies cotton knit sweaters with double banded neck imported from Hong Kong and classified in liquidation under TSUS item 382.00 as modified by T.D. 68–9 as women's *ornamented* wearing apparel, *held*, not classifiable as claimed by the importer under TSUS item 382.06 as modified by T.D. 68–9 as women's wearing apparel, *not ornamented*, where the only evidence adduced by the importer is a sample sweater exhibiting a double banded neck which would not be revealing, upon ocular inspection by a lay person, of any latent functional characteristics, and there being nothing in the testimony of the Government's witness which would affect favorably the importer's burden of proof.

Court No. 76–8–01863

Port of Los Angeles

[Dismissed.]

(Decided June 10, 1977)

Glad, Tuttle & White (*Edward N. Glad* and *T. Randolph Ferguson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Steven P. Florsheim*, trial attorney), for the defendant.

RICHARDSON, Judge: The merchandise at bar, described on the invoice as "Ladies' knitted 100% cotton roll sleeves, square neck pullover," was exported from Hong Kong on or about March 28, 1976. It was entered and classified in liquidation under TSUS item 382.00 as modified by T.D. 68–9 at the duty rate of 35 *per centum ad valorem* as women's wearing apparel, ornamented, of cotton. It is claimed by the importer that the merchandise should be classified under TSUS item 382.06 as modified by T.D. 68–9 at the duty rate of

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[12] In view of this conclusion, it is unnecessary to reach the question as to whether the sales in issue were in the ordinary course of trade.

21 *per centum ad valorem* as women's wearing apparel, not ornamented, of cotton, knit.

Central to the issue of ornamentation raised by the pleadings herein is the question of whether the upper (or second) banding on the double banded neck of the imported knit cotton sweaters is functional. In this connection it is to be noted that headnote 3(a)(B) of schedule 3 of TSUS, among other things, excludes from the meaning of the term "ornamented" "functional stitching or one row of straight hem-stitching adjoining a hem" on fabrics and other articles of textile materials.

At the trial the only evidence adduced by plaintiff was a sample of the merchandise which was received in evidence as exhibit 1. At this point plaintiff's counsel stated (R. 3), "As we feel, in cases like this, the sample speaks louder than words, the plaintiff rests." Exhibit 1 possesses a double banding around the neck portion of the garment.

The only testimony in the record is that of Dr. Joan H. Lare, professor of Home Economics at California State University at Long Beach whose specialty is textiles and clothing. She holds Bachelor of Science and Master of Science degrees in Textiles and Clothing from Cornell University and her Ph. D. degree in Home Economics Education from Cornell University. Dr. Lare, called as a witness on defendant's behalf, testified on direct examination that her understanding of the term "ornamentation" was the embellishment or decoration of clothing by means of the addition of things such as beads, fancy stitching, lace, or an extra piece of fabric or trim (R. 7). The witness stated that in her opinion exhibit 1 was ornamented by virtue of the presence of the second banding at the neck portion of the garment (R. 7–8). She said that, while the first or lower banding served the purpose of finishing the edge of the fabric, and kept the fabric from stretching and raveling, "The second (upper) banding is decorative, begins to be decoration. It is not needed; it is extra. It serves no utilitarian function." (R. 8.)

On cross-examination Dr. Lare testified that the second or upper banding did not give added reinforcement to the garment and did not prevent stretching (R. 11–12). And it was further brought out on cross-examination of the witness that existing testing methods would not show any measurable addition of strength or durability attributable to the presence of the second or upper banding (R. 12–13).

Plaintiff, relying entirely on the sample, argues that two plies of the banded material provide for greater strength in terms of stabilizing the neck against the tendency of the fabric to stretch, than does one ply of material. Defendant counters by asserting, among other things, "Plaintiff's Exhibit 1 only demonstrates, visually, the nature

of the merchandise, and its questioned neck banding. It does not, as plaintiff seems to assert, in and of itself demonstrate to a person having no expertise in textiles and clothing that: '. . . the upper (second) banding on the subject merchandise serves a primary utilitarian function of reinforcing the stability of the neck of the garment' (plaintiff's brief, p. 9)."

The court agrees with the defendant. An examination of exhibit 1 would not disclose to a lay person any latent functional characteristics of the upper neck banding. And since the sample is not such that the utilitarian characteristics of the upper neck banding, if any, are brought within the realm of judicial knowledge upon mere ocular inspection, see *United States* v. *Sheldon & Co.*, 13 Ct. Cust. Appls. 53, T.D. 40880 (1925) and *United States* v. *Lee & Co.*, 9 Ct. Cust. Appls. 111, T.D. 37977 (1919), it was incumbent upon plaintiff to adduce testimonial evidence from persons familiar with the manufacture of the garment in issue and the nature and purpose of its double neck banding in order to support its contention and rebut the presumption of ornamentation. Nothing contained in the testimony offered on behalf of the defendant could be said to assist the plaintiff in meeting its burden of proof. *V. W. Davis* v. *United States*, 16 Cust. Ct. 163, 174, C.D. 1005 (1946), *aff'd*, 35 CCPA 79, C.A.D. 374 (1947). The defendant's evidence establishes that the upper neck banding constitutes ornamentation.

It follows, therefore, that plaintiff has failed to rebut the presumption of correctness attaching to the classification of the merchandise at bar, in consequence of which, this action must be dismissed. Judgment will be entered herein accordingly.

C.D. 4702

PAUL M. W. BRUCKMANN *v.* UNITED STATES

On Defendant's Motion and Plaintiff's Cross-Motion for Summary Judgment

Court Nos. 72-5-01008, etc.

Port of Mobile

[Defendant's motion denied; plaintiff's cross-motion granted.]

(Dated June 16, 1977)

Paul M. W. Bruckmann pro se.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section, and *David R. Ostheimer*, trial attorney), for the defendant.

MALETZ, Judge: These consolidated cases which come before the court on cross-motions for summary judgment have been submitted on a stipulation of facts and involve the question as to the proper tariff classification of parts of street lamps that were designed to be operated by gas. More specifically, the parts—which were imported from England through the port of Mobile—consisted of:

(1) 100 articles invoiced as "gas lamp stems" which were imported in 1968;[1]
(2) 100 articles invoiced as "gas lamps complete" consisting of gas lamp "stems" and gas lamp "tops" which were imported in 1970, with the stems and tops packed in separate cases;[2]
(3) 50 articles invoiced as "gas lamps complete" likewise consisting of gas lamp "stems" and gas lamp "tops" which were imported in 1971, with the stems and tops again packed in separate cases.

The imported gas lamp stems and tops were classified by the government under item 653.39 of the Tariff Schedules of the United States which covers other illuminating articles and parts thereof of base metal, and assessed duty at the rate of 19% ad valorem.

Plaintiff, on the other hand, relying on general interpretative rule 10(ij) of the tariff schedules—which prescribes in part that "a provision for 'parts' * * * does not prevail over a specific provision for such part"—claims that the gas lamp stems, while parts of street lamps, are properly classifiable under item 652.93 of the tariff schedules, as modified, T.D. 68–9, which provides, among other things, for columns, pillars, posts, beams, girders and similar structural units, and requires a rate of duty of 2.5%, 2% or 1.5% ad valorem depending upon the date of entry.

In the alternative, plaintiff claims that since the gas lamp stems are parts, they are classifiable under item 653.30 of the tariff schedules, as modified, T.D. 68–9, which is contained under the superior heading "Illuminating articles and parts thereof, of base metal:" and covers incandescent lamps, designed to be operated by gas, dutiable at the rate of 9%, 7% or 6% ad valorem depending upon the date of entry.

Plaintiff further claims that the imported gas lamp tops are, as parts, likewise classifiable under the same item of the tariff schedules set out in the preceding paragraph, i.e., item 653.30, as modified.

The relevant provisions of the tariff schedules are as follows:

10. General Interpretative Rules. For the purposes of these schedules—

* * * * * * *

[1] The "stems" in issue were hollow cast-iron gas lamppost stems or standards which were chiefly used to support gas lamp lanterns and to provide a hollow housing for the gas supply line.

[2] The "tops" in issue consisted of copper gas lamp lanterns and iron or steel "frogs" which connected the "tops" to the "stems." The "frogs" were not shipped attached to the "tops," but rather as separate items.

(ij) a provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part.

Schedule 6, Part 3, Subpart F:

	Hangars and other buildings, bridges, bridge sections, lock-gates, towers, lattice masts, roofs, roofing frameworks, door and window frames, shutters, balustrades, columns, pillars, and posts, and other structures and parts of structures, all the foregoing of base metal:	
	Of iron or steel:	
	* * * * * * *	
	Columns, pillars, posts, beams, girders, and similar structural units:	
	Not in part of alloy iron or steel:	
652.93	Cast-iron (except malleable cast-iron) articles, rough or advanced----------	(3)
	* * * * * * *	
	Illuminating articles and parts thereof, of base metal:	
653.30	Incandescent lamps designed to be operated by propane or other gas, or by compressed air and kerosene or gasoline----------	(4)
	Other:	
653.35	Table, floor and other portable lamps for indoor illumination, of brass----------	* * *
	Other:	
653.37	Of brass----------	* * *
653.39	Other----------	19% ad val.

I

Against the background of these tariff provisions, we consider first plaintiff's claim that by virtue of general interpretative rule 10(ij), the imported lampposts—which, as previously observed, are referred to as gas lamp stems—are properly classifiable under item 652.93 which covers columns, pillars, posts, and similar structural units of cast iron. It is undisputed that the stems are of cast iron; that

[3] Under item 652.93, the rate of duty for articles entered in 1968 is 2.5% ad valorem; for articles entered in 1970, the rate of duty is 2% ad valorem; for articles entered in 1971, the rate of duty is 1.5% ad valorem.

[4] Under item 653.30, the rate of duty for articles entered in 1968 is 9% ad valorem; for articles entered in 1970, the rate of duty is 7% ad valorem; for articles entered in 1971, the rate of duty is 6% ad valorem.

each weighs in excess of 300 pounds and is in one piece; and that each is designed as a lamppost to be sunk into the ground and to support a street light lantern on top.

However, it must be concluded that the imported stems are not the type of article intended to be covered by item 652.93. Thus, in *Laurence Myers Scaffolding Co.* v. *United States*, 57 Cust. Ct. 333, 340, C.D. 2809, 259 F. Supp. 874, 879 (1966), *appeal dismissed*, 56 CCPA 133 (1967), this court, after examining various definitions covering the terms used in item 652.93, stated: "Running through the foregoing definitions is the concept that a column, pillar, or post, when ready for use, is a unitary element providing upright *support to a building* or *structure*." (Emphasis added.) And in *J. Ray McDermott & Co., Inc.* v. *United States*, 69 Cust. Ct. 197, 207, C.D. 4394, 354 F. Supp. 280, 287 (1972), *cross-appeals dismissed*, 60 CCPA 185 (1973), the court added: "From the definitions and from the decided cases, it appears that an essential characteristic of a column, pillar, or post insofar as classification for tariff purposes is concerned, is that it be a firm upright *support for a structure*." (Emphasis added.) The lamp stems here involved unquestionably do not support a building or a structure. Thus they are not structural units in a tariff sense [5] and, accordingly, are not classifiable under item 652.93.

II

We come next to plaintiff's claim that since the lamp stems and tops are parts, they were erroneously classified under item 653.39 and are properly classifiable under item 653.30. Thus, the basic issue is whether or not the provision of item 653.30 includes parts of the article described in that provision. On this phase, defendant argues that an inspection of the provisions of the tariff schedules makes it clear that item 653.39, not 653.30, is intended to encompass the parts which fall under the superior heading "Illuminating articles and parts thereof, of base metal:". Elaborating on this argument, defendant states (br. p. 2):

> The colon of the superior heading clearly represents, through punctuation, an attempt to show that each provision under it is intended to be a specific elaboration of the superior heading. No implication as to the parts can therefore be made for each provision. To the contrary, if a provision is to encompass parts it should so specify. This fact is borne out by an inspection of similar type provisions of the Tariff Schedules where parts

[5] The term "structure" was defined in *Simon, Buhler & Baumann* v. *United States*, 8 Ct. Cust. Appls. 273, 276, T.D. 37537 (1918), as follows:

> Ordinarily speaking, "structure" carries with it the idea of size, weight, and strength, and it has come to mean anything composed of parts capable of resisting heavy weights or strains and artificially joined together for some special use.

were intended to be included. For example, item 661.65 falls under a superior heading which is similar to the superior heading of item 653.30, in that it also provides for "parts thereof." Item 661.65 does however specifically provide: "Instantaneous or storage water heaters, and parts thereof." This is a prime illustration of a situation where Congress intended to include parts under a certain item and so specified. The Tariff Schedules are filled with such examples. [Footnote omitted.] It is thus clear that in those situations where Congress intended parts to be included within the embrace of an item falling under a superior heading which contains the phrase "parts thereof," Congress ordinarily specified that such item was to include parts. * * * It follows that since item 653.30 does not specifically provide for parts, Congress did not intend parts to be included thereunder, and that item 653.39, the so-called basket provision for the superior heading "Illuminating articles and parts thereof, of base metal," is the provision Congress intended the parts to be classified under.

This argument, it is concluded, is without merit. For in the court's view, it seems clear in the circumstances of this case that the reason for the superior heading in question was to render each of the provisions indented thereunder a "parts" provision. In other words, the purpose of incorporating the superior heading at the margin with the provisions following the colon indented below in series was to make plain that the superior heading modified all that followed. In point on this aspect is *Velan Steam Spec. et al.* v. *United States*, 57 CCPA 58, C.A.D. 976, 420 F. 2d 1399 (1970). In *Velan* the involved merchandise was classified under item 680.22 of the tariff schedules covering hand-operated and check valves. The importer-appellant contended that the merchandise merely consisted of parts of valves which should have been classified under item 680.27.

The provisions of the tariff schedules (as existing on the date of entry, September 23, 1963) read in material part as follows:

	Taps, cocks, valves, and similar devices, however operated, used to control the flow of liquids, gases, or solids, all the foregoing and parts thereof:	
	Hand-operated and check:	
680.20	Of copper	* * *
680.22	Other	22.5% ad val.
	Other:	
680.25	Ballcock mechanisms, and parts	* * *
680.27	Other	10% ad val.

The involved tariff schedule item, as amended by Public Law 89–241, effective December 7, 1965, read in material part as follows:

* * * * * * *

Hand-operated and check, *and parts thereof:*

[Emphasis added.]

The appellate court affirmed the decision of this court (62 Cust. Ct. 136, C.D. 3700 (1969)) on the basis that the provision for "Other" in item 680.22 covers all hand-operated valves *and parts* thereof. Particularly pertinent is the following statement of the appellate court in *Velan* (57 CCPA at 61, 420 F. 2d at 1401–2):

> We have here a situation where the applicable statute consists of a superior heading and two inferior headings with four article descriptions (items 680.20 through 680.27), two indented under each inferior heading. *The superior heading has broad sweep covering various valves and "similar devices, however operated" as well as their parts, thus indicating that parts are covered in the provisions which immediately follow.* The only article description mentioning parts per se is item 680.25, covering ballcock mechanisms and parts thereof. *Where the framework and the language admit, it is the duty of the court to so construe a statute as to give effect to every part thereof. Giving effect to the statute so as to embrace coverage for parts of hand-operated and check valves under item 680.22 as classified, is, in our opinion, fully consonant with the terms of the statute under consideration. To read the words "parts of hand-operated and check" not into item 680.22 but into item 680.27, a provision clearly intended to cover devices other than hand-operated and check, would in our judgment constitute a resort to judicial legislation contrary to congressional intent.* [Emphasis added.] [6]

It is apparent that the statutory provisions involved here are quite similar in form to the statute in *Velan*. Thus in the present case, the superior heading has four article descriptions (items 653.30, 653.35, 653.37 and 653.39) with two inferior headings. And as in *Velan* the superior heading here has "broad sweep covering various * * * [illuminating articles * * *] as well as their parts, thus indicating that parts are covered in the provisions which immediately follow." 57 CCPA at 61, 420 F.2d 1401. Indeed, the statutory provisions here involved are even more persuasive than those in *Velan* in leading to the conclusion that Congress intended to provide for all parts of illuminating articles in the provisions covered by the superior heading. For here unlike the statutory structure in *Velan*—which contains a specific parts provision in item 680.25—there is no reference whatever to parts in the provisions that follow the superior heading. The point is that if the parts provision of the superior heading here involved were not to apply to all the provisions thereunder, it would have no efficacy whatever and thus would contravene the established rule of statutory

[6] The appellate court further held that the 1965 amendment which specifically included "parts" of "hand-operated and check valves" was "intended only to clarify the language originally employed * * *." 57 CCPA at 61, 420 F. 2d at 1402. Parenthetically, it is interesting to note that in *Velan*, the government in its appellate brief (pp. 6–12) took precisely the *opposite* position it takes here. Thus, in its appellate brief (p. 8), the government stressed that the superior heading providing for "taps, cocks, valves, and similar devices * * * *and parts thereof*" (emphasis added) was applicable in reference to item 680.22 not only to other hand-operated valves but also to *parts thereof*—this notwithstanding that item 680.22 did not contain specific language covering parts.

construction that the entire context of a statute must be considered and every effort must be made to give effect to all of its language. See, e.g., *United States* v. *Gulf Oil Corporation, et al.*, 47 CCPA 32, 35, C.A.D. 725 (1959).

Defendant, however, argues (as previously noted) that even though a superior heading contains a provision for parts, the provisions thereunder do not encompass parts unless they so specify. This conclusion, defendant maintains, comes from an inspection of similar type provisions of the tariff schedules where parts are specifically provided for notwithstanding that the superior heading also provides for parts. However, according to defendant, an exception exists in the case of a basket provision. For in defendant's view, where a superior heading contains a parts provision, then the basket provision covers parts even though parts are not therein specified. But applying defendant's own test, an inspection of similar type provisions of the tariff schedules shows that parts are specifically provided for under various *basket provisions* notwithstanding that the superior heading also provides for parts. For example, in the same Subpart F of Schedule 6 as here involved, the provisions for chains read as follows:

	Chain and chains, and parts thereof, all the foregoing of base metal not coated or plated with precious metal:					
	Of iron or steel:					
	Chain or chains used for the transmission of power, and parts thereof:					
	Of not over 2-inch pitch and containing more than three parts per pitch, and parts thereof:					
652.12	Valued under 40 cents per pound	*	*	*		
	* * * * * * *					
652.18	Other	*	*	*		
652.21	Anchor or stud link chain or chains, and parts thereof	*	*	*		
	Chain or chains (except the foregoing) the links of which are of stock essentially round in cross section, and parts thereof:					
652.24	Under 5/16 inch in diameter	*	*	*		
	5/16 inch or more but under 3/8 inch in diameter	*	*	*		
	* * * * * * *					
652.35	*Other, including parts* [emphasis added]	*	*	*		

What this comes down to is that in connection with defendant's particular argument, other provisions of the tariff schedules afford no guidance here in determining whether or not item 653.39, the so-called basket provision for the superior heading "Illuminating articles and parts thereof * * *," is the *only* provision Congress intended parts of illuminating articles to be classified under. Nor by the same token do other provisions of the tariff schedules afford guidance here in determining whether or not item 653.30 covers parts of illuminating articles. Indeed, were we to carry defendant's reasoning to its logical conclusion, *no* provision encompassed by the superior heading "Illuminating articles and parts thereof" would cover parts. This would include, among others, item 653.39, the basket provision, and item 653.30, the claimed provision.

In sum, it is concluded that the clear intent of Congress in using the term "and parts thereof" as an adjunct to the term "illuminating articles" in the superior heading to items 653.30, 653.35, 653.37 and 653.39 is to render all of those provisions parts provisions. Otherwise, the provision for parts in the superior heading would be nugatory. It is therefore held that by virtue of the superior heading, item 653.30 of the tariff schedules provides for parts and that the imported lamp stems and tops are properly classifiable thereunder, as claimed by plaintiff.[7]

For the foregoing reasons, defendant's motion for summary judgment is denied; plaintiff's cross-motion for summary judgment is granted; and the district director at the port of Mobile is hereby directed to reliquidate the imported lamp stems and tops in issue under item 653.30 of the tariff schedules, as modified, T.D. 68–9.

(C.D. 4703)

MITSUBISHI INTERNATIONAL CORP. *v.* UNITED STATES

Rubber sole canvas footwear

Consolidated Court No. R66/7083

Port of New York

(Dated June 23, 1977)

Sharretts, Paley, Carter & Blauvelt (*Peter Jay Baskin* of counsel);* *Lane, Young & Fox* (*Peter Jay Baskin, Michael O'Rourke* and *Ellsworth F. Qualey* of counsel);** for the plaintiff.

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[7] In view of this conclusion, it is unnecessary to consider plaintiff's further argument that the imported gas lamps and stems are entireties classifiable under item 653.30.

*Substituted as attorneys of record on June 1, 1977.

**Attorneys of record at the trial.

Barbara Allen Babcock, Assistant Attorney General (*Robert B. Silverman* and *David R. Ostheimer*, trial attorneys), for the defendant.

Decision, Judgment and Order

Boe, Judge.

Whereas the plaintiff has filed in this court approximately 11,000 causes of action relating to the dutiable value under section 402a(g) of the Tariff Act of 1930, as amended, on miscellaneous styles and patterns of rubber sole canvas footwear imported into the United States from Japan, Taiwan, Korea and the Philippine Islands between January 1, 1963 and December 31, 1969, and

Whereas by prior order of this court entered under date of July 18, 1975, 128 of the aforesaid causes of action were consolidated for purpose of trial and thereafter designated as Consol. Court No. R66/7083; that pursuant to the rules of this court, the aforesaid consolidated cause of action was designated a test case by order of the court entered under date of July 18, 1975, under which test case the plaintiff suspended the remaining causes of action specifically included in the schedule attached to the order of this court in the case of *Mitsubishi International Corp., et al.* v. *United States*, Court No. R66/12197, etc., entered under date of December 27, 1973, and

Whereas trial of the consolidated cause of action Court No. R66/7083 commenced before this court on April 29, 1976 and on June 10, 1976 was concluded and submitted to this court for determination upon submission of briefs by counsel, and

Whereas parties hereto with the approval of the Attorney General of the United States having reached a negotiated settlement of all of the causes of action filed by the plaintiff, as aforereferred to, now:

(1) Seek a decision and judgment of this court determining the American selling price valuation of each article of merchandise included in the cause of action designated Consol. Court No. R66/7083 to be in the amount specified in the schedule attached to the written stipulation of the parties hereto and filed with this court under date of June 15, 1977, and

(2) Agree that the plaintiff abandon all of the remaining causes of action hereinbefore referred to in accordance with rule 8.3(a)(1) of this court and thereafter without further supervision or direction by this court, mutually agree upon the American selling price valuation of each article of merchandise included in all of the remaining actions filed by the plaintiff as hereinbefore referred to pursuant to the terms of an independent and supplemental agreement entered into by the parties, which supplemental agreement has neither been filed nor made a part of this proceeding, and

Whereas in order to expeditiously and effectively process the determination of the appropriate valuations of the articles of merchandise in all of the causes of action hereinbefore referred to as

agreed upon by stipulation, whether filed with this court or otherwise, the parties have requested that the file or files of each cause of action be made physically available by the clerk of this court to the Customs Section, Office of the Assistant Attorney General, thereby permitting the determination of the negotiated valuation of all such merchandise under the immediate direction of that office and representatives of the plaintiff, now therefore, it is hereby

ORDERED, ADJUDGED AND DECREED

(1) That the various articles of footwear, specifically described by pattern number on the schedule attached to the stipulation made and entered into by the parties hereto through their respective counsel and filed with this court on the 15th day of June 1977 are properly dutiable on the basis of American selling price as defined in section 402a(g), Tariff Act of 1930, as amended, and that the proper value for each article is the value designated on the attached schedule by the column entitled "DUTIABLE VALUE (PER PAIR)."

(2) That the clerk of this court is authorized to transmit to the custody of the chief of the Customs Section, Office of the Assistant Attorney General, 26 Federal Plaza, New York, New York, upon request, the files of this court relating to and designated Consol. Court No. R66/7083 as well as the files of all other causes of action filed by the plaintiff and presently suspended thereunder and which are specifically included on the schedule attached to the order of this court entered under date of December 27, 1973, in the case of *Mitsubishi International Corp., et al.* v. *United States*, Court No. R66/12197, etc.

(3) That upon the final determination of the appropriate valuations in conformity with the terms of the stipulation filed herein and the independent and supplemental agreement entered into between the parties, the chief of the Customs Section, Office of the Assistant Attorney General, shall transmit directly to the customs official at the appropriate port of entry, the necessary papers and directives requisite to effect proper liquidation and to thereupon promptly return to the clerk of this court the file of each cause of action.

(C.D. 4704)

D. H. BALDWIN CO. ET AL. *v.* UNITED STATES

Electric guitars

EXPORT VALUE—FAIRLY REFLECTS MARKET VALUE

Proof that price of merchandise exceeded production costs and generated a profit for seller is insufficient to prove export value. Proof of export value must derive from the export market to the United States. Citing, *J. L. Wood* v. *United States*, 62 CCPA 25, C.A.D. 1139, 505 F. 2d 1400 (1974).

FAIRLY REFLECTS MARKET VALUE—ARMS LENGTH NEGOTIATIONS

While proof of arms length negotiations may support a finding the price fairly reflected the market value of the merchandise, in this instance the manager of the exporting manufacturing subsidiary remained an employee of the parent importer and the requisite independence of action between the buyer and seller could not have existed.

Court Nos. R69/1511, etc.

Ports of New Orleans, St. Louis, and Cleveland

[Judgment for defendant.]

(Decided June 29, 1977)

Barnes, Richardson & Colburn (*Richard C. King* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*David R. Ostheimer*, trial attorney), for the defendant.

WATSON, Judge: This is a dispute over the basis of valuation for tariff purposes of certain electric guitars manufactured by plaintiff's subsidiary in England and exported in 1967 and 1968. The transactions between plaintiff and its subsidiary were the only sales for export to the United States of such or similar merchandise. Plaintiff claims export value,[1] rather than constructed value,[2] should be the basis of appraisement.

In circumstances where export sales are made to a selected purchaser rather than to all who wish to buy, the merchandise will nevertheless be considered "freely sold" within the statutory meaning

[1] Section 402(b), Tariff Act of 1930, as amended:

(b) EXPORT VALUE.—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

[2] Section 402(d), Tariff Act of 1930, as amended:

(d) CONSTRUCTED VALUE.—For the purposes of this section, the constructed value of imported merchandise shall be the sum of—

(1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise undergoing appraisement which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise undergoing appraisement which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for shipment to the United States; and

(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise undergoing appraisement in condition, packed ready for shipment to the United States.

of "export value" if it is sold at a price which "fairly reflects the market value of the merchandise." [3]

Plaintiff tried to prove the prices it paid fairly reflected the market value by showing the prices exceeded the production costs, generated a profit for the subsidiary and resulted from "arms length" negotiations between the two companies.

The first line of proof has no bearing on export value. Export value must be determined from the market for export to the United States, not from conditions prevailing in other markets or from makeshift adaptation of other methods of valuation such as constructed value (cost of production). *J. L. Wood* v. *United States*, 62 CCPA 25, 32, C.A.D. 1139, 505 F.2d 1400 (1974).

The lack of a market for export to the United States, other than the transactions in dispute, does not justify turning to markets which have been unequivocally closed to consideration by the opinion in *J. L. Wood* v. *United States*, *supra*, i.e., the home market in the country of exportation and the home country export market to third countries. An exception to the rule expressed in the *J. L. Wood* case cannot be made by this court.

Use of the seller's production costs and profit figures is similarly precluded as a basis for determining export value. Not only would this move the determination of export value outside the market for export to the United States; it does not follow that a "profitable" price necessarily means the price reflects the full fair market value of the merchandise.

As to plaintiff's second line of proof, I can accept the theoretical possibility of proving that a price fairly reflected the market value solely from the fact the price was arrived at by "arms length" negotiations. *National Carloading Corporation* v. *United States*, 57 Cust. Ct. 758, 765, A.R.D. 215 (1966); *Spanexico, Inc.* v. *United States*, 75 Cust. Ct. 123, 133–34, C.D. 4616, 405 F. Supp. 1078, 1086–87 (1975), *aff'd*, 64 CCPA 6, C.A.D. 1176, 542 F. 2d 568. In this instance, however, plaintiff failed to prove the negotiations were at "arms length." For the manager of the manufacturing subsidiary to remain an employee of the importing parent, as was the case here, is inconsistent

[3] Section 402(f)(1), Tariff Act of 1930, as amended:

(f) DEFINITIONS.—For the purposes of this section—

(1) The term "freely sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—

(A) to all purchasers at wholesale, or

(B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,

without restrictions as to the disposition or use of the merchandise by the purchaser, except restrictions as to such disposition or use which (i) are imposed or required by law, (ii) limit the price at which or the territory in which the merchandise may be resold, or (iii) do not substantially affect the value of the merchandise to usual purchasers at wholesale.

with the degree of independence which must exist between two companies whose conduct in price negotiations is to serve as the sole justification for concluding the price agreed upon fairly reflects the market value of the merchandise. When we are so far away from classical free market conditions, precluded from an accounting dissection or construction of the price, cut off from reference to sales in markets other than that for export to the United States and when, in that market, we are without resort to sales by other manufacturers or by this manufacturer to other selected purchasers, we are at the outer limits of the area in which it is possible to obtain a "reflection" of the fair market value. In such circumstances, since the source of the substantiation is so limited, it is only reasonable to require that it be clear; an unmistakable indication that traditional, untrammeled opposing market forces were at work. In this crucial respect plaintiff's proof was deficient.

There have been cases in which export value was found to exist despite considerably less than complete managerial separation between the exporter and its related selected purchaser. This was so in the *J. L. Wood* case as well as *Greb Industries, Ltd.* v. *United States*, 64 Cust. Ct. 608, R.D. 11691, 308 F. Supp. 88 (1970). But in those instances the substantiation of fair market value came from sales to unrelated purchasers, not from the conduct of negotiations between the related companies. Had there been no sales to unrelated purchasers in those cases I venture to say findings of export value would have been problematic. See for example, *Spanexico, Inc.* v. *United States*, *supra* at 134–35.

It follows from the above that plaintiff has failed to prove its claimed values and the appraised values must be affirmed.

Judgment will enter accordingly.

DECISIONS OF THE UNITED STATES CUSTOMS COURT

Reappraisements

R.D. 11779

ERNEST LOWENSTEIN, INC. *v.* UNITED STATES

Beads

EXPORT VALUE—PRICE FAIRLY REFLECTING MARKET VALUE

The prices at which a foreign manufacturer sold merchandise to a selected purchaser for export to the United States held to fairly reflect market value within the meaning of section 402(f)(1)(B) of the Tariff Act of 1930, as amended, since the record showed (1) that the manufacturer-seller's prices to the unrelated selected purchaser at the primary level of distribution were equatable with the prices paid for the same merchandise by a purchaser at the third level of distribution; and (2) there was no evidence in the record that the dealings between the manufacturer and selected purchaser were anything but at arm's length and *bona fide* in all respects. Further, where, as here, a seller is the sole manufacturer in the country of exportation and makes sales for export to the United States exclusively to a wholly unrelated company without restriction as to the disposition or use of that merchandise in the United States, the price between the parties is *the* market value of the merchandise within the statutory understanding. *J. L. Wood* v. *United States*. 62 CCPA 25, C.A.D. 1139, 505 F. 2d 1400 (1974) followed.

Court No. R64/2246

Entered at New York, New York.
Entry No. 996721.

(Decided on remand [A.R.D. 322] January 27, 1977)

Siegel, Mandell & Davidson (*Steven S. Weiser* and *Harvey A. Isaacs* of counsel) for the plaintiff.

Irving Jaffe, Acting Assistant Attorney General (*Glenn E. Harris*, trial attorney), for the defendant.

MALETZ, Judge: This case is again before the trial court on remand by order of the Appellate Term, Second Division of this court,

74 Cust. Ct. 189, A.R.D. 322 (1975). The background is this: An application for review had been taken by the plaintiff to the Appellate Term from the decision and judgment of this court in *Ernest Lowenstein, Inc.* v. *United States*, 71 Cust. Ct. 201, R.D. 11776, 367 F. Supp. 1330 (1973), sustaining the appraised export values of certain glass stones, pendants, beads and similar merchandise (hereinafter referred to as "stones and beads") that were exported from Austria, the country of manufacture, in March 1963 and entered at the port of New York in April 1963.

While this application for review was pending, the Court of Customs and Patent Appeals rendered its decision in *J. L. Wood* v. *United States*, 62 CCPA 25, C.A.D. 1139, 505 F.2d 1400 (1974), discussed *infra*, which in large part overruled a number of prior cases setting out the criteria for determining whether, in a selected purchaser situation, a purchase price fairly reflects the market value of the merchandise. In view of the decision in *J. L. Wood*, the Appellate Term *sua sponte* remanded this case to the trial court "for all purposes." Upon remand, both sides were given an opportunity to present additional evidence, with the defendant availing itself of this opportunity.

The record establishes that the imported stones and beads (which were used to make costume jewelry) were produced in Wattens, Austria by D. Swarovski & Co. (Swarovski), the sole manufacturer in that country of such or similar articles. Swarovski had sold the merchandise for export to the United States at its published list prices, less 15 percent, to Lowenstein Overseas Company (LOC), a Liechtenstein concern to which it was totally unrelated, under a distributorship agreement appointing LOC the exclusive distributor of such articles for export to all countries outside of Europe.

LOC in turn resold the merchandise to the plaintiff-importer Lowenstein, its exclusive customer in the United States, at the Swarovski list prices, less 12½ percent.

Under the sales practice prevailing at the time, when LOC received an order for stones and beads from the plaintiff, LOC would place an identical order with Swarovski, instructing the latter to ship the merchandise directly from Wattens, Austria to plaintiff in the United States. Upon shipment of the merchandise, Swarovski billed LOC at the published list price, less 15 percent, and LOC, in turn, billed plaintiff at list, less 12½ percent.

The shipment herein was entered at LOC's invoiced unit price to plaintiff, i.e., list, less 12½ percent. However, the appraising officer, using export value as defined in section 402(b), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, as the basis of appraisement, valued the merchandise at the *Swarovski* list prices,

which he arrived at by adding 14.3 percent to LOC's invoiced unit prices to plaintiff.

Plaintiff agrees that export value is the proper basis of appraisement but contends that the statutory export values are represented by Swarovski's sales to LOC (list, less 15 percent) which, in terms of the official action taken, are the appraised values, less 15 percent.

The statutory provisions covering export value to the extent relevant here are contained in section 402 of the Tariff Act of 1930, as amended (19 U.S.C. 1401a), and read as follows:

> (b) Export Value.—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.
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> * * * * * * *
>
> (f) DEFINITIONS.—For the purposes of this section—
>
> (1) The term "freely sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—
>
> (A) to all purchasers at wholesale, or
>
> (B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,
>
> without restrictions as to the disposition or use of the merchandise by the purchaser, except restrictions as to such disposition or use which (i) are imposed or required by law, (ii) limit the price at which or the territory in which the merchandise may be resold, or (iii) do not substantially affect the value of the merchandise to usual purchasers at wholesale.
>
> (2) The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise undergoing appraisement, have been normal in the trade under consideration with respect to merchandise of the same class or kind as the merchandise undergoing appraisement.
>
> * * * * * * *

It is to be added that there is no dispute that the sale in controversy was between Swarovski and LOC; that the merchandise was not on the Final List; that there is no issue as to usual wholesale quantities; that the merchandise was sold for export to the United States from Austria; that the principal market was Wattens, Austria; and that LOC, as the exclusive purchaser for export to the United States

during the involved period, was a selected purchaser at wholesale within the meaning of section 402(f)(1)(B).

In this setting, plaintiff's claim is grounded upon the above cited provisions of section 402, as amended, which allows sales to one or more selected purchasers to be adopted as the proper measure of export value if the prices fairly reflect the market value of the merchandise. Thus, the sole question presented here is whether plaintiff has met its burden of proving that the appraised values are erroneous and that Swarovski's prices to its selected purchaser, LOC, i.e., list, less 15 percent, fairly reflected the market value of the merchandise.

The case, as initially tried on this issue, was presented and decided in accordance with a line of decisions, commencing with *United States* v. *Acme Steel Company*, 51 CCPA 81, C.A.D. 841 (1964), wherein the Court of Customs and Patent Appeals had held (p. 89) that—

> * * * all sales in the ordinary course of trade are proper for consideration in ascertaining the price which fairly reflects the market value of the merchandise and that evidence of price, and hence of the value of goods in the foreign market, is relevant to the ultimate determination of the export value of imported merchandise within the ambit of section 402(b) of the Tariff Act of 1930, as amended, supra, in the case of sales to selected purchasers.

In the cases following *Acme*, it was held that proof of sales in the ordinary course of trade in the country of exportation for home consumption and, where available, to third countries other than the United States, was relevant in selected purchaser situations as a standard against which to compare the claimed prices and to ascertain whether or not they fairly reflected the market value of the goods sold or offered for sale for exportation to the United States. E.g., *John V. Carr & Son, Inc.* v. *United States*, 52 CCPA 62, C.A.D. 860 (1965); *Myerson Tooth Corporation* v. *United States*, 64 Cust. Ct. 860, A.R.D. 273, 313 F. Supp. 1016 (1970). Thus, if the export price to the United States was lower than the domestic price in the exporting country or the price to third countries, but the price differential could be justified—as attributable, for example, to certain expenses not incurred in producing for export to the United States—the courts have found that the selling price to the United States embodied all of the material elements entering into the statutory definition of export value. *United States* v. *Acme Steel Company, supra; John V. Carr & Son, Inc.* v. *United States, supra; C. J. Tower & Sons of Niagara, Inc.* v. *United States*, 60 Cust. Ct. 938, A.R.D. 233 (1968).

Another method of establishing that the sale for export to the United States was at a price fairly reflective of market value was to prove that the transaction was the result of *bona fide* negotiations and

that the price was high enough to include all costs of production, general expenses entering into the export transaction, and a profit. *United States* v. *F. W. Myers & Co., Inc.*, 63 Cust. Ct. 706, A.R.D. 264, 306 F. Supp. 1396 (1969), *appeal dismissed*, 57 CCPA 141 (1970); *Judson Sheldon International Corporation* v. *United States*, 67 Cust. Ct. 577, A.R.D. 295, 331 F. Supp. 1393 (1971), *appeal dismissed*, 59 CCPA 223 (1971).

In sum, until *J. L. Wood* was decided in December 1974, the approaches outlined above were utilized to determine export value in cases where the claimed values were predicated upon sales to a selected purchaser. See generally Sturm, *A Manual of Customs Law* (1974) pp. 79–83.

In these circumstances, at the previous trial plaintiff sought to establish its claimed values by comparing, and attempting to reconcile, Swarovski's sales to LOC for export to the United States at list, less 15 percent, with Swarovski's sales of identical merchandise (1) in the home market to Austrian manufacturers and other Austrian purchasers at list with no discount, and (2) to manufacturers in some European countries at list with no discount and to dealers in other European countries at list, less discounts ranging from 10 to 19 percent.[1]

At the first trial defendant called Egon Rausnitz, a partner in Wepra Company (Wepra), located in New York City, and Abraham Frankel, "part owner" of Fred Frankel & Sons, Inc. (Frankel), also located in New York City.

Mr. Rausnitz testified that prior to 1965 his firm Wepra was engaged mainly in the wholesaling of stones and beads, most of which were purchased from plaintiff in New York. During 1962 and 1963 Wepra purchased some Swarovski merchandise from International Export of Vaduz, Liechtenstein at prices lower than it would have paid plaintiff for the goods. At about the end of 1964, Wepra purchased such merchandise from the firm of Neuman and Wenzel of Linz, Austria (a local manufacturer of costume jewelry) at a discount of 6.8 percent off the Swarovski list price and in April 1965 it commenced to buy directly from Swarovski.

Mr. Frankel, whose firm has imported beads, trimming and rhinestones for 60 years, testified that from 1953 through 1961 his firm purchased "quite a few million dollars" worth of Swarovski merchandise from Dr. Josef Russ, an exporter in Linz, Austria, who had in turn bought them from Neuman and Wenzel of Linz. The witness

[1] During the period in issue, approximately 15 percent, in monetary terms, of Swarovski's total sales of stones and beads was shipped to Austrian manufacturers and dealers; 30 percent was shipped to manufacturers and dealers in other European countries; 40 percent to LOC's customer, plaintiff-Lowenstein, in the United States; and 15 percent to other LOC non-European customers.

stated that in 1961 his purchases from Russ amounted to "as a guess, four, five hundred thousand dollars" (R. 29) and that they decreased in succeeding years.

The record evidence pertaining to these two witnesses was not detailed in the trial court's opinion but was characterized as indicating that although most of the merchandise sold by Swarovski in the home market to Austrian purchasers "apparently was used for home consumption * * * a small, undisclosed amount found its way to two dealers in the United States." *Ernest Lowenstein, Inc.* v. *United States*, *supra*, 71 Cust. Ct. at 203, n. 3.

The trial court found, however, that plaintiff was unable to reconcile satisfactorily the disparities between Swarovski's prices to LOC and its varying prices, whether at discount or at the list prices, for domestic consumption in Austria and to third countries. It held, therefore, that plaintiff had failed to establish that the prices to LOC fairly reflected the market value of the merchandise and affirmed the appraised values. *Ernest Lowenstein, Inc.* v. *United States*, *supra*.

While the *Lowenstein* application for review was pending before the Appellate Term, the decision in *J. L. Wood* came down, as heretofore noted, and overruled in major respects *Acme Steel* and much of the case law stemming therefrom. More specifically, in the *Wood* case, our court of appeals reexamined the amended export value provision of section 402 in light of its legislative history and concluded that Congress clearly intended that export value was to be determined by considering *only* the exporting country's market for exportation to the United States. It specifically overruled *Acme Steel* to the extent that it approved consideration of sales in the domestic market of the exporting country in the determination of export value. The court further held that "market value" to be fairly reflected pursuant to subdivision 402(f)(1)(B) is the market value for exportation to the United States, that is, the price which the merchandise is able to command in that market. See Sturm, *A Manual of Customs Law* (Supp. 1976) p. 26. As the court stated in *Wood* (62 CCPA at 32–3):

> * * * Although the term "market value" in subdivision 402 (f)(1)(B) was not defined in the Act, it obviously must relate to the relevant market. In the case of export value, this would be the export market in the exporting country to the United States and *not the foreign domestic market*, since use of the latter would result in a determination of foreign value, which was deleted by the Act.
>
> From the foregoing, we conclude that Congress clearly intended that export value be determined by considering *only the exporting country's market for exportation to the United States* and that sales at wholesale to exclusive or selected agents be used in deter-

mining export value if the prices fairly reflect the market value. *United States* v. *Acme Steel Co.*, 51 CCPA 81, C.A.D. 841 (1964) is hereby overruled to the extent that it approved consideration of sales in the domestic market of the exporting country in the determination of export value. * * *

* * * * * * *

The "market value" which must be fairly reflected according to subdivision 402(f)(1)(B) is the market value for exportation to the United States (i.e., export value), and this is the price which the merchandise is able to command in the market for exportation to the United States.[2] [Emphasis added in part.]

The court also observed by way of footnote that the prices to selected purchasers were to be "measured against the market value and not some other standard such as costs of production." [3]

Thus, under the new formula, as enunciated in *Wood*, export value may be determined only by considering sales in the exporting country's market for exportation to the United States, and the court is precluded from considering sales in the domestic market of the exporting country or to third countries. Furthermore, in the absence of any sales or offers of sale, the costs of purchasing the merchandise may no longer be taken into account.

With the foregoing in mind, it follows that, if the "market value" which must be fairly reflected in sales to selected purchasers is the "price which the merchandise is able to command in the market for exportation to the United States" (62 CCPA at 33), all export sales to purchasers in the United States, unless made under abnormal or irregular conditions, are appropriate for consideration in determining statutory export value. Indeed, as this court reads *Wood*, such sales constitute the only relevant market evidence against which the prices to the selected purchaser may be compared in determining "market value."

Viewed in this perspective, the record, as supplemented after remand to this court, takes on a different dimension. At the second hearing, plaintiff offered no additional evidence, but defendant recalled the witnesses Rausnitz and Frankel who had testified at the earlier hearing.

At the second hearing, Mr. Rausnitz was unable to recall when or from whom Wepra had purchased the additional Swarovski items, but indicated that they were insubstantial compared to his purchases from plaintiff-Lowenstein, which constituted approximately 90 to 95 percent of the total.

Mr. Frankel testified that, from 1953 to the period immediately preceding March 1963, he had purchased Swarovski stones and beads

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[2] Footnotes omitted.
[3] 62 CCPA at 32, n. 13.

from Dr. Russ in Linz, Austria at approximately 90 percent of the Swarovski list price (i.e., Swarovski's list price, less 10 percent). Frankel's annual purchases from Dr. Russ amounted to approximately one million dollars, but only 40 percent of this amount was for Swarovski stones and beads. Frankel in turn resold the articles to jewelry manufacturers.

It is important to emphasize that Frankel's purchases were not made directly from Swarovski, but through Dr. Russ who had purchased them from Neuman and Wenzel, a local costume jewelry manufacturer in Linz, Austria, which in turn bought them from Swaskrovi. Thus, although there were two intervening distributors, each of whom, it must be presumed, obtained a profit, Frankel was nonetheless able since 1953 to purchase the merchandise at Swarovski's list price, less 10 percent, as compared to Swarovski's sales to LOC at Swarovski's list price, less 15 percent.

We find that the sales to Frankel were substantial, regular and made in the ordinary course of trade at the third level of distribution; and that the prices paid by Frankel at this level may be easily equated with—at the very least, they approximate—the prices paid by LOC at the primary level to the manufacturer. More particularly, the fact that two intervening parties (i.e., Neuman and Wenzel, and Dr. Russ) could buy and sell this merchandise, presumably making a profit on each transaction, and the resultant sale to a United States purchaser (Frankel) was only 5 percent higher than to a purchaser (LOC) buying directly from the manufacturer is in the court's view clear indication that the latter sale fairly reflects the market value of the goods. We find, therefore, that the sales to Frankel fully support plaintiff's claim that Swarovski's sales to LOC at the list price, less 15 percent, fairly reflect their market value.[4]

Nor do we find merit to defendant's contention, raised for the first time after the rehearing, that plaintiff had failed to show that LOC's 15 percent discount resulted from *bona fide* arm's length negotiations. In the first place, Swarovski was unrelated to LOC by consanguinity, corporate affiliation, interlocking equity, stock ownership, or otherwise. Further derogating from defendant's contention is the evidence (previously set forth) of the sales in Austria of Swarovski stones and beads for export to Frankel in the United States at prices which enabled him, although third removed in the line of distribution, to resell the merchandise at "cheaper prices" than the Swarovski list prices and only 5 percent higher than Swarovski's prices to LOC, its primary distributor. Finally, there is not even a scintilla of evidence

[4] The record evidence as to the sales to Wepra is disregarded as vague, inconclusive and, moreover, as having been directed in part to sales for export from Liechtenstein which, of course, is not the "country of exportation" for purposes of the valuation statute.

in the record that the dealings between Swarovski and LOC were anything but at arm's length and *bona fide* in all respects. *Cf. Spanexico, Inc.* v. *United States*, 75 Cust. Ct. 123, C.D. 4616, 405 F. Supp. 1078 (1975), *aff'd* 64 CCPA 6, C.A.D. 1176 (1976).

Significant too is the additional consideration that where, as here, the seller, Swarovski, is the sole manufacturer in the country of exportation, which company made sales for export to the United States exclusively to a wholly unrelated company, LOC (the merchandise being consigned and shipped directly to plaintiff) without restriction as to the disposition or use of the merchandise in the United States, the price between the parties is not one which merely "fairly reflects" market value, it is *the* market value of the merchandise within the statutory understanding. For the price to LOC was one which that buyer (LOC) was willing to pay and the seller (Swarovski) was willing to take, thereby establishing the market value of the goods. As stated in *J. L. Wood, supra*, 62 CCPA at 33:

> In this case, we have all necessary market evidence, since Carter, Ltd., sells for export to selected purchasers in the United States—Carter, Inc. [a related purchaser] and the OEMs. The price to the OEMs and to Carter, Inc. is the same. Because the OEMs are unrelated to Carter, Ltd., or Carter, Inc., *further proof of what price the merchandise is able to command in the market is not needed.* We join the trial court in saying: "What better proof is there of the price fairly reflecting the market value when sales are made to other unrelated United States concerns at the same basic price." [Emphasis added; footnote omitted.]

Here, LOC stands in the shoes of the unrelated purchasers to which the court looked for the purpose of determining whether the price between the related parties was at market value. Had there been a second related purchaser in the present case, the court, as it did in *Wood*, would have compared the prices to that company with the LOC price. In this circumstance, it would be completely illogical to accord this LOC price a less or different status because of the absence of a related purchaser.

In conclusion, and for the foregoing reasons, plaintiff's claim that the appraised values, less 15 percent, represent the proper statutory export values of the merchandise in issue is sustained. Judgment will be entered accordingly.

DECISIONS OF THE UNITED STATES CUSTOMS COURT

Rules

(C.R.D. 77–1)

RUSSELL STANFIELD DEXTER *v.* UNITED STATES

Jurisdiction

JURISDICTION—ALL WRITS ACT

This court has no jurisdiction to grant relief to plaintiff in connection with entries of merchandise which have not been liquidated and regarding which protests have not been filed and denied. The All Writs Act, 28 U.S.C. § 1651(a), grants power in aid of the court's existing jurisdiction under 28 U.S.C. § 1582 and does not give the court power to compel anyone to do those acts such as liquidation and denial of protest which are a necessary prelude to the exercise of jurisdiction.

Court No. 76–3–00817

Port of Boston

[Plaintiff's motion to compel liquidation and determination of protest denied.]

(Dated January 11, 1977)

Doherty and Melahn (*William E. Melahn* of counsel) for the plaintiff.
Rex E. Lee, Assistant Attorney General (*Bernard J. Babb* and *Mark K. Neville, Jr.*, trial attorneys), for the defendant.

Memorandum Opinion and Order

WATSON, Judge: This is the latest case to draw attention to the precise and narrow jurisdictional limits within which this court operates. In essence, plaintiff wants the court to compel defendant to liquidate (within 15 days of the proposed order or 15 days of entry of the merchandise) all present and future entries of plaintiff's merchandise of the type involved in this action and to further compel defendant to act on any resulting protests within 15 days of receipt. In short,

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plaintiff wants defendant to do those acts which must be done in order for this court to obtain jurisdiction under 28 U.S.C. § 1582.[1]

Plaintiff seeks this relief to remedy what it considers a deprivation of due process of law brought about by defendant's failure to liquidate its entries until long after plaintiff has paid the additional duties. Plaintiff characterizes the liquidations as purely ministerial acts which do nothing but delay judicial review of the earlier substantive decision of the appropriate customs officer.

Plaintiff cites the All Writs Act, 28 U.S.C. § 1651(a),[2] as the source from which this court derives the power to grant it relief from the constitutional deprivation it claims.

The All Writs Act does not give this court jurisdiction to require anyone to satisfy the preconditions of jurisdiction. It only gives the court instruments with which to effectuate existing jurisdiction. This is clear from the language of the act itself as well as from recent case law. In *Matsushita Electric Industrial Company, Ltd., et al.* v. *The United States Treasury Department et al.*, 67 Cust. Ct. 328, C.D. 4292 (1971), *aff'd*, 60 CCPA 85, C.A.D. 1086 (1973), *cert. denied*, 414 U.S. 821 (1973), the plaintiff sought injunctive and declaratory relief in this court with respect to a finding by the Secretary of the Treasury that certain television sets imported from Japan were being sold at less than fair value, a finding which upon entry would make them subject to dumping duties under the Antidumping Act of 1921, as amended. The simple fact that the requirements of 28 U.S.C. § 1582 were not met, i.e. no liquidated duties had yet been paid and no protest filed and denied, was held to preclude the exercise of jurisdiction by the court.

Plaintiff seeks to draw a distinction between the *Matsushita* case, viewed as a complete avoidance of the steps of liquidation and protest and the relief sought here, characterized as being in aid of this action (76-3-00817) in which jurisdiction already exists and is undisputed. But this action in reality only covers one specific liquidated entry and has no legal connection to the entries for which relief is sought. As to those entries, the assertion of jurisdiction to issue the proposed order would bypass the liquidation and protest as certainly as was

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[1] 28 U.S.C. § 1582 in pertinent part reads as follows:

(a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, * * *.

* * * * * * *

(c) The Customs Court shall not have jurisidiction of an action unless (1) either a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended, and denied in accordance with the provisions of section 515 of the Tariff Act of 1930, as amended, * * * and * * * all liquidated duties, charges or exactions have been paid at the time the action is filed.

[2] The All Writs Act, 28 U.S.C. § 1651(a) reads as follows:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

attempted in the *Matsushita* case. The *Matsushita* rationale remains equally applicable here. Until the entries are liquidated and protests denied this court has no jurisdiction over them, not even by way of its jurisdiction over another entry of exactly the same merchandise.

Plaintiff also seeks to draw an analogy to the use of the All Writs Act by an appellate court to exercise jurisdiction over cases within its potential jurisdiction even though no appeal has been perfected. That, however, is a distinct and exceptional circumstance which comes about as a result of the supervisory powers of an appellate court and it is limited to those courts. See, for example, *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966). The general rule is that the All Writs Act does not enlarge the jurisdiction of a court. *Benson* v. *State Board of Parole & Probation*, 384 F. 2d 238, 239 (C.A. 9 1967) *cert. denied*, 391 U.S. 954 (1968).

In the absence of jurisdiction I do not reach the merits of plaintiff's claim that the lack of a time limit on liquidation is a deprivation of due process of law. Under these circumstances if plaintiff is to have its day in court it must be in a forum in which the acts of liquidation and protest are not jurisdictional prerequisites. In any event it is worth noting that the Tariff Act of 1930, as amended, has withstood similar constitutional challenges before. *Dart Export Corp. et al.* v. *United States*, 43 CCPA 64, C.A.D. 610 (1956). It would appear that if the relevant jurisdictional statute satisfies the rudimentary constitutional requirements plaintiff's real argument is with the terms of the legislation and the final resolution of such a problem is a matter within the special competence of Congress. Congress is the proper body to consider whether the existing limitations on the jurisdiction of the court are possibly permitting the existence of inequities, which although they may not be unconstitutional, are nevertheless incompatible with our sense of fairness and the spirit of an impartial and equitable government of laws.

For the reasons expressed above, it is

ORDERED, that plaintiff's motion for an order compelling the defendant to liquidate all pending unliquidated entries filed by plaintiff covering merchandise manufactured by R. J. Draper & Co., Ltd., wherein defendant required a deposit of additional duties, within 15 days after entry of such order by the court, and to give notice thereof, and for an order requiring defendant to act upon any protest filed against said liquidations within 15 days of the filing thereof, and to give notice thereof by certified mail on the date of such action; and requiring defendant's counsel to report the status of each entry to the court within 30 days of such order, and for certain ancillary relief, pursuant to the All Writs Act, 28 U.S.C. § 1651(a), be, and hereby is, denied.

(C.R.D. 77–2)

JIMLAR CORP. *v.* UNITED STATES

On Plaintiff's Motion for Summary Judgment

Court No. 74–8–02201

Footwear

Port of San Francisco

[Motion denied.]

(Dated January 14, 1977)

Shaw and Stedina (*Charles P. Deem* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Ira J. Grossman*, trial attorney), for the defendant.

MALETZ, Judge: This is a motion by plaintiff for summary judgment pursuant to rule 8.2. Defendant opposes the motion on the ground that there exists a genuine issue as to a material fact that requires resolution by a trial.

The action involves the proper tariff classification of an entry of footwear originating in and exported from Taiwan and imported at the port of San Francisco in 1973. The imported footwear was classified under item 700.80 of the tariff schedules, as modified by T.D. 68–9, as footwear with uppers of fibers other than vegetable fibers and assessed duty at the rate of 12.5% ad valorem. Plaintiff claims the footwear is properly classifiable under item 700.70, as modified, as footwear with uppers of vegetable fibers dutiable at the rate of 7.5% ad valorem.[1]

Against this background, the single issue in the case is whether the imported footwear has uppers in chief value of vegetable fibers (i.e., cotton), as claimed by plaintiff, or whether the uppers are in chief value of man-made fibers (i.e., rayon and/or nylon) as determined by the government. Put most succinctly, the question is whether the uppers are in chief value of cotton or in chief value of man-made fibers.

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[1] More specifically, the relevant provisions of the tariff schedules read as follows:

	Footwear, with uppers of fibers:	
	• • • • • • •	
	With soles of material other than leather:	
	[Claimed]	
700.70	With uppers of vegetable fibers	7.5% ad val.
	• • • • • • •	
	[Classified]	
700.80	Other	12.5% ad val.

It is to be noted that under general headnote 9(f)(i) of the tariff schedules the term "of" when used (as here) between the description of an article and a material means that the article is wholly or in chief value of the named material.

It is of course basic that the proper method of determining the chief value of the imported uppers is to ascertain the costs of the separate component materials at the time when they have reached the state when nothing further need be done to them except combine them into the completed article. E.g., *United States* v. *Jovita Perez*, 44 CCPA 35, 39, C.A.D. 633 (1957). It is also settled that the value of each component in an article includes not only the cost of the basic material, but work done on it to bring it to the point of assembly, and thus in a subassembly of two or more components, the costs of subassembling are to be added to the various components in proportion to their relative quantities or weights. *Field & Co.* v. *United States*, 7 Ct. Cust. Appls. 332, T.D. 36876 (1916); *N. Erlanger Blumgart Co., Inc.* v. *United States*, 57 CCPA 127, C.A.D. 991, 428 F. 2d 860 (1970).

In light of these principles, to support its position that the uppers were in chief value of cotton, plaintiff relies on an affidavit by Chin Yi-Chiung, co-owner since May 1969 of Kai-Tai Enterprise Co., Ltd., the manufacturer of the imported footwear. In his affidavit, dated March 27, 1976, Chin attests that he is "thoroughly familiar with and supervise[s] all aspects of * * * [the company's] business operations"; that he "participate[s] actively in the day-to-day operations of the company," and that he has "personal knowledge of the costs of the materials * * * [the company] purchase[s] to manufacture shoes." Considering that Chin was thus co-owner of the company, was familiar with and supervised *all* aspects of the company's business operations,[2] participated actively in the day-to-day operations of the company, and had personal knowledge of the costs of the materials the company purchased to manufacture shoes, it must be concluded that in contradistinction to the situation in *Beck Distributing Corp.* v. *United States*, 77 Cust. Ct. 158, 160, C.R.D. 76-7 (1976) (slip op. pp. 5-6) Chin's affidavit shows affirmatively that, as required by rule 8.2(f), the affiant was competent to testify to the matters stated therein.

Beyond this, Chin's affidavit goes on to say (p. 4) that "[b]ased on the cost and production records of my company and my personal knowledge, I have calculated the costs at the time of final assembly of the various upper components of a size 7 shoe." On the basis of these calculations by Chin, the cotton value of the upper was approximately 12 cents per shoe while that of the man-made fiber components was approximately 7 cents.

However, for the reasons that follow, the values thus calculated by Chin of the component material costs cannot be afforded probative weight. *Cf. Henry A. Wess, Inc.* v. *United States*, 68 Cust. Ct. 201,

[2] The court interprets Chin's affidavit to mean that as co-owner of the company with the responsibility of supervising *all* aspects of the company's business operations, the firm's business records were under Chin's supervision.

203, C.D. 4361 (1972). It is true that the business records of Chin's company need not be submitted to the court as part of his affidavit. *Ibid.* For as stated in *J. C. Penny Purchasing Corporation* v. *United States*, 77 Cust. Ct. 48, 59, note 8, C.D. 4671 (1976) (slip op. p. 19):

> * * * [W]ith regard to voluminous documents, 4 *Wigmore on Evidence* (Chadbourn rev. 1972) § 1230, pp. 535–41 indicates that the convenience of trials demands that summaries of complicated, burdensome or voluminous original records prepared by competent individuals be offered in evidence as the only practicable way of receiving such proof. The most commonly recognized application of the principle stated above is that by which business transactions are allowed to be shown by schedule or summary. * * *

Notwithstanding this permissible latitude, Chin's affidavit is still lacking in numerous material respects. For example, as stated previously, Chin attests that "[b]ased on the cost and production records of my company and my personal knowledge, I have calculated the costs at the time of final assembly of the various upper components of a size 7 shoe." In these circumstances, it is important to know in his calculation of the costs what figures Chin took from the cost and production records of his company and what figures were based on his personal knowledge. As to these matters, Chin's affidavit is totally silent. Nor is there any indication in Chin's affidavit as to the content of his company's cost and production records or indeed whether they still exist. And finally, there is a total absence of any supporting documentation for the claimed cost data. *Cf. J. C. Penny Purchasing Corporation* v. *United States*, *supra*, slip op. pp. 18–19. In view of these considerations, Chin's affidavit cannot form the basis for summary judgment in plaintiff's favor, and plaintiff's motion for such judgment is hereby denied.

(C.R.D. 77–3)

FORTUNE STAR PRODUCTS CORP. *v.* UNITED STATES

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 72–7–01497

Port of New York

[Motions denied.]

(Dated February 11, 1977)

Siegel, Mandell & Davidson (*Brian S. Goldstein* of counsel) for the plaintiff.

Irving Jaffe, Acting Assistant Attorney General (*Herbert P. Larsen*, trial attorney), for the defendant.

MALETZ, Judge: This case concerns the proper tariff classification of merchandise invoiced as "Eskimo Doll Radios" that was imported from Japan via the port of New York. The sample consists of a figure of a human baby, having a head, arms and feet composed of a soft rubbery material. It has brown hair and is clothed in a soft, plush, blue and white outfit with a hood made of the same material. The figure is approximately 13 inches high and 10 inches wide with arms extended. It cannot stand or sit up unsupported.

Protruding on the back portion of the body are two black radio knobs, one of which serves as an on/off switch and volume control for a battery-powered transistor radio which is housed inside the body. A similar protruding black knob about 1 inch adjacent to the first knob is the station selector. Recessed in a zippered compartment in the rear interior of the body is the transistor radio (with dimensions of about 3" by 2¼" by 1") which is connected to a radio speaker about 2 inches in diameter located in the front interior. The parties agree that the merchandise is not a combination article but rather is an entirety for tariff purposes.

The imported merchandise was classified by the government as "dolls" under item 737.20 of the tariff schedules, as modified by T.D. 68-9, and assessed duty at the rate of 24% or 21% ad valorem, depending upon the date of entry.

Plaintiff claims that the merchandise is properly classifiable under item 685.23, as modified by T.D. 68-9, as a solid-state (tubeless) radio receiver and should be assessed with duty at the rate of 11% or 10.4% ad valorem, depending upon the date of entry. Alternatively, plaintiff claims that the merchandise is more than a doll and more than a radio and is thus classifiable under item 688.40, as modified by T.D. 68-9, as an electrical article, not specially provided for, dutiable at the rate of 8% or 6.5% ad valorem, depending on the date of entry.[1]

Quoted below are the relevant provisions of the Tariff Schedules of the United States (19 U.S.C. 1202, as modified by Pres. Proc. 3822, T.D. 68-9, 82 Stat. 1455):

Schedule 7, Part 5, Subpart E. — Models; Dolls, Toys, Tricks, Party Favors

Subpart E headnotes:

1. The articles described in the provisions of this subpart (except parts) shall be classified in such provsions, whether or not such articles are more specifically provided for elsewhere in the tariff schedules, . . .

* * * * * * *

[1] Defendant has claimed in the alternative that the merchandise is properly classifiable as toys, not specially provided for, dutiable under item 737.90 at the rate of 24% or 21% ad valorem, depending on the date of entry. However, defendant adds—and the court agrees—that this alternative claim need not be considered for purposes of the present cross-motion, in view of the greater specificity of the original government classification.

Classified under:		
737.20	Dolls, and parts of dolls including doll clothing	24% or 21% ad val. [depending on date of entry]
Claimed under:		
	Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, and television cameras; record players, phonographs, tape recorders, dictation recording and transcribing machines, record changers, and tone arms; all of the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus, and parts thereof:	
* * * * * * *		
	Other:	
685.23	Solid-state (tubeless) radic receivers	11% or 10.4% ad val. [depending on date of entry]
Alternatively claimed under:		
688.40	Electrical articles, and electrical parts of articles, not specially provided for	8% or 6.5% ad val. [depending on date of entry]

The essential issue in this setting is whether the imported article is a "doll," as classified, or is more than a doll, as claimed by plaintiff. On this issue, plaintiff contends that *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F.2d 1315 (1970) is dispositive here. In *New York Merchandise* the imported article consisted of a stuffed, plush-covered poodle dog, about 12 inches in overall length, and containing in a concealed, zippered compartment a battery-powered transistor radio which was operated by control knobs protruding out from the nose and chest parts of the stuffed animal. The government classified the article under item 737.30 of the tariff schedules as a stuffed toy figure of an animate object and assessed duty at 18% ad valorem. The appellate court affirmed the decision of this court, sustaining the protest and holding that the importation was "more than" a toy figure of an animate

object and that it was properly classifiable under item 685.22 as a radio dutiable at 12½%. See *New York Merchandise Co., Inc.* v. *United States*, 62 Cust. Ct. 283, C.D. 3746, 305 F. Supp. 25 (1969). The court concluded that the poodle dog figure was more than a toy figure of an animate object on the basis that the main commercial value of the article was derived from the radio component and that the radio contributed substantially to the uniqueness and value of the entire article. In reaching this conclusion, the court regarded the following facts in addition to the sample as determinative: The radio portion of the imported article constituted the component of chief value of the entire article; the wholesale price for the imported article was approximately three times that of comparable stuffed animals sold by the importer as toys for children; the federal excise tax applicable to radios was paid upon sale of the imported article; between 1965 and 1966 more than 140,000 of these articles were imported and sold through gift shops or department stores where they were displayed on counters with radios and other electric articles and were advertised and sold as "novelty radios." See *United States* v. *New York Merchandise Co., Inc., supra*, 58 CCPA at 55–56.

With these considerations in mind, plaintiff contends that the merchandise in the present case is similar in all material respects to the merchandise in *New York Merchandise* and that the present merchandise should accordingly be classified under item 685.23 as other solid-state (tubeless) radio receivers, as claimed. More particularly, plaintiff insists that as in *New York Merchandise* the main commercial value of the article was derived from the radio component and that the radio component contributed subsequently to the uniqueness of the entire article (as opposed to defendant's argument that the radio component was merely an incidental part of the whole product). To support its contention, plaintiff has submitted an affidavit by George Gluck, corporate secretary and executive officer of the plaintiff-importer, which position he has held since 1960. To the extent relevant, Gluck attests in his affidavit that plaintiff has been in existence since 1950 and has imported and sold such items as consumer electronics articles, lighters, umbrellas, etc.; that throughout the period he has been with the company his duties have included the purchase, importation and sale of these articles, including the Eskimo Doll Radio; that "*based upon my personal knowledge of the costs associated with the production of our imported products, the predominant cost factor for the imported article is attributable to the radio and not the stuffed figure exterior*" (emphasis added); and that the "main commercial value of the article is derived from the radio component which contributes substantially to the uniqueness and value of the entire article."

Continuing, Gluck states in his affidavit that his company has sold the imported item through jewelry stores, department stores, electronics outlets and novelty outlets where it was sold with other radios and similar merchandise; that the item has always been considered in the electronics home-products field as a novelty radio; and is of a class of radio which includes such items as "puppy radios" and "poodle dog radios" as represented in plaintiff's catalogue.

Finally, Gluck attests that he does not consider that the article in question falls within the broad understanding of the term "doll"; that it is his opinion, based on years of experience in the purchase, sale and use of novelty radios, that the article in question is not chiefly used for amusement of children or adults; and that, rather, he considers the item to be a novelty radio.

One of the factors supporting the outcome of the *New York Merchandise* case was that the parties had stipulated that the radio portion was the component in chief value of the overall poodle dog radio. Also, additional information as to the price aspect was provided by a company which assembled and distributed similar animal radios. Plaintiff herein attempts to prove the same set of facts by statements made by its affiant, Gluck, which, however, do not constitute factual proof. Plaintiff is *not* the manufacturer of the merchandise, yet the affiant claims that he has "personal knowledge of the costs associated with the production of our imported products." Lacking is any basis shown in the affidavit for Gluck's asserted personal knowledge that "the predominant cost factor for the imported article is attributable to the radio and not the stuffed figure exterior." He does not state that he has ever discussed the manufacturer's actual costs or that he had any responsibility for manufacturing, processing or purchasing the materials that make up the Eskimo Doll Radio. No cost details are delineated and no records were produced in support of the affidavit.

Rule 8.2(f) of this court requires that affidavits offered in support of a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The lack of documentation, cost details, and explanation, as to the basis of Gluck's knowledge of the costs of the various component materials and parts of the merchandise, is a fatal defect in the affidavit. As a result, his affidavit cannot be given any weight in resolving the crucial question as to the predominant cost factor of the merchandise. See *Beck Distributing Corp.* v. *United States*, 77 Cust. Ct. 158, C.R.D. 76–7 (1976). *Cf. Jimlar Corp.* v. *United States*, 78 Cust. Ct., 182 C.R.D. 77–2 (1977).[2] Nor can it be

[2] In view of the defectiveness of the affidavit in this major respect, it is unnecessary to reach the question as to whether or not the affidavit has any probative weight on the question as to whether the imported articles were in fact merchandised and sold as "novelty" radios. See *United States* v. *New York Merchandise Co., Inc., supra*, 58 CCPA at 56.

determined by an examination of the sample alone whether the radio is or is not an incidental feature of the article. In other words, reliance on the sample itself is not helpful in resolving the question as to whether for tariff purposes the importation is a doll or more than a doll. For the foregoing reasons, plaintiff's motion for summary judgment must be denied.

We turn now to defendant's cross-motion for summary judgment in support of which it has submitted the affidavits of two individuals who have been employed in the doll business for a number of years. Thus, an affidavit by Will Goldsmith of New York states that he has been employed in the doll business for the past 30 years; that for the past 5 years he has been assistant sales manager for a firm manufacturing dolls; and that prior to that he served as a national account executive for another doll manufacturer after holding the position for 5 years as sales manager for yet another doll manufacturer. Goldsmith declared in his affidavit that he was personally familar with the doll industry and with all types of merchandise marketed as dolls; that he has examined the sample in the present case; that in his opinion the sample possesses all of the characteristics necessary to be considered a doll as that term is known in the trade "and is in fact a doll, within the common meaning of that word." Goldsmith's affidavit goes on to state that it is his "further opinion that the inclusion of the radio in this item does not make the item more than a doll"; and that dolls may incorporate additional novelty features (such as tears, voices, phonographs, etc.) which do not deter from the doll's primary purpose and function of being a doll. Finally, Goldsmith attests that it is his further opinion, based upon the knowledge of the marketing of dolls, that the sample would be chiefly used for the amusement of children.

Rose Chais, defendant's second affiant, attests in her affidavit that she has worked in the doll business for over 25 years during all of which time she has been employed by the New York Doll Hospital, New York City; that her duties at that hospital involve appraising and repairing dolls of all kinds and acting as a seller-buyer of antique dolls. The affiant states that she has examined the sample involved here and has concluded that since it has arms, legs and hair it is a doll; that the presence of the radio does not make it something other than a doll since a doll "can have anything one wants to put inside it and still be a doll"; and that the primary use of the sample is a slumber doll to put children to sleep.

Assuming arguendo that the two foregoing affiants were competent to testify to the matters stated in their affidavits and that their opinions would be admissible in evidence (which is highly doubtful) it is obvious that their opinions that the importations come within the common meaning of the term "dolls" are totally inappropriate and

can be given no probative weight. For the common meaning of a tariff term is a question of law and an affidavit is no place for opinions—such as here contained—for conclusions of law. See 6 Moore's *Federal Practice* (2d ed. 1976) pp. 56–1312 – 56–1318. In these circumstances, defendant's cross-motion for summary judgment must also fail.

To sum up, both plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment are denied.

(C.R.D. 77–4)

POINT FOUR LTD., INC. *v.* UNITED STATES

Leather sport shoes

MOTION TO DISMISS—PLEADING JURISDICTIONAL DEFECT IN ANSWER

Motion by government to dismiss action on jurisdictional grounds will be denied without prejudice to asserting the jurisdictional defense in its answer as the court would be ill advised to decline jurisdiction in the case if the allegations in the complaint relating to alleged deceptive and improper practices of customs officials in misdirecting and delaying the filing of the importer's protests can be given full credence.

Court No. 76–9–01963

Port of Cleveland (Toledo)

[Motion denied.]

(Dated May 12, 1977)

Paul A. Tscholl for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Steven P. Florsheim*, trial attorney), for the defendant.

RICHARDSON, Judge: In this action embracing importations of athletic footwear from Taiwan defendant moves pursuant to Rule 4.7(b) for an order dismissing the action for lack of jurisdiction. Defendant contends that the entries were liquidated on December 5, 1975, that the two protests involved herein were filed against these liquidations on March 16, 1976, or 102 days after the liquidations, and that the protests are untimely because not filed within 90 days of liquidation as required by 19 U.S.C.A., section 1514, as amended.

Plaintiff-importer opposes the motion, contending that, acting without counsel, it was advised by customs personnel at the port of entry (Toledo, Ohio) that it should file its protests at Chicago,

Illinois (regional commissioner's office), that it seasonably mailed the protests to Chicago as advised, and that the Chicago office sat on the protests until the protest time limitation expired, and then forwarded them to the district director at the headquarters port (Cleveland, Ohio) where they were received and filed as of March 16, 1977. Plaintiff argues that defendant should not be allowed to benefit from its erroneous advice to plaintiff followed by its deliberate and wilful delay in transmission of the protests to the Cleveland district director.

In the present posture of the action plaintiff has filed a complaint in which it is averred, among other things:

> 3. Protest was mailed, upon advice of the Toledo office, to U.S. Customs Service, Chicago, Illinois, February 27, 1976. They forwarded it to Cleveland, Ohio office where it was stamped March 15, 1976 and dated filed as March 16, 1976.

No answer to the complaint has been interposed inasmuch as defendant obtained an order of the court on January 5, 1977, on *consent* for an extension of 60 days for the reason "that additional time is required to investigate the factual allegations set forth in the complaint, so that said allegations may be accurately and appropriately answered."

Section 1514(b)(1)(2), as amended, requires, among other things, that a protest be filed with the *appropriate customs officer* designated in regulations prescribed by the Secretary [of the Treasury] within 90 days after *notice*[1] of liquidation. And, according to section 174.12(d) of the customs regulations, the appropriate customs officer for the filing of the protests in this case would be either the district director at Cleveland or the port director at Toledo where the involved entries were made.

Although customs officials are not required to advise importers as to the nature and extent of their rights, see *Flagstaff Liquor Company* v. *United States*, 73 Cust. Ct. 132, 137, C.D. 4563, 388 F. Supp. 554 (1974), and cases cited on page 138, nevertheless, the rights of importers will not be forfeited as a consequence of deceptive or improper practices indulged in by customs officials. See *A. H. Burr* v. *United States*, 9 Cust. Ct. 13, 19–20, C.D. 651 (1942) [improper delay by customs officials in time-stamping the importer's entry papers until after the closing of a cattle quota]; *Henry A. Wess, Inc.* v. *United States*, 25 Cust. Ct. 34, 37, C.D. 1259 (1950) [examination of merchandise by the wrong customs official acting under color of authority]; and *Snake King* v. *United States*, 18 Cust. Ct. 33, 35, C.D. 1041 (1947) [acceptance of protest by deputy collector after

[1] It is to be noted that the moving papers do not address themselves to Notice of Liquidation, but only to the liquidation *per se*. However, the statute runs from the date of Notice of Liquidation, and not from the date of liquidation, if liquidation occurs on a different date.

the regulation closing hour on the 60th day after liquidation]. If full credence be given to the allegations in the third paragraph of the complaint in this case it is clear that the ends of justice as well as the objective of the statute of limitations will be ill served by a declination of jurisdiction on the part of the court. But at this point in the proceedings a judgment in the matter either way is premature, there being no evidentiary record before the court in connection with this motion.

However, inasmuch as defendant has procured a postponement in the joinder of issue under a commitment to *answer the complaint*, it is appropriate that it be required to do so. Accordingly, defendant's motion to dismiss is denied, without prejudice, however, to raising the jurisdictional issue herein by way of its answer.

(C.R.D. 77–5)

KNICKERBOCKER LIQUORS CORP. *v.* UNITED STATES

Memorandum Opinion and Accompanying Order

Court No. 74–11–03088

Port of New York

[Motion to dismiss denied.]

(Dated June 9, 1977)

Rode & Qualey (*Peter Jay Baskin* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Laura D. Millman*, trial attorney), for the defendant.

BOE, Judge: Pursuant to rules 4.7(b)(2) and 4.12 of the rules of court, the defendant has moved to dismiss the above-entitled action for lack of jurisdiction because of plaintiff's failure to timely file the summons in said action pursuant to 28 U.S.C., section 2631(a), providing:

> § 2631. Time for commencement of action.
>
> (a) An action over which the court has jurisdiction under section 1582(a) of this title is barred unless commenced within one hundred and eighty days after:
>
> (1) the date of mailing of notice of denial, in whole or in part of a protest pursuant to the provisions of section 515(a) of the Tariff Act of 1930, as amended; or
>
> (2) the date of denial of a protest by operation of law pursuant to the provisions of section 515(b) of the Tariff Act of 1930, as amended.

The following facts, pertinent to the determination of this motion, are undisputed:

(1) the plaintiff filed a protest in the within action on April 26, 1972,
(2) a notice of denial was mailed to the plaintiff on November 1, 1974, and
(3) the plaintiff filed a summons in said action on November 7, 1974.

In support of its motion to dismiss the defendant asserts that the timeliness of the filing of the summons in the instant action must be determined in conjunction with the provisions of 19 U.S.C., section 1515, providing:

> § 1515. Review of protests; administrative review and modification of decisions; request for accelerated disposition of protest.
>
> (a) Unless a request for an accelerated disposition of a protest is filed in accordance with subsection (b) of this section the appropriate customs officer, within two years from the date a protest was filed in accordance with section 1514 of this title, shall review the protest and shall allow or deny such protest in whole or in part. Thereafter, any duties, charge, or exaction found to have been assessed or collected in excess shall be remitted or refunded and any drawback found due shall be paid. Upon the request of the protesting party, filed within the time allowed for the filing of a protest under section 1514 of this title, a protest may be subject to further review by another appropriate customs officer, under the circumstances and in the form and manner that may be prescribed by the Secretary in regulations, but subject to the two-year limitation prescribed in the first sentence of this subsection. Notice of the denial of any protest shall be mailed in the form and manner prescribed by the Secretary.
>
> (b) A request for accelerated disposition of a protest filed in accordance with section 1514 of this title may be mailed by certified or registered mail to the appropriate customs officer any time after ninety days following the filing of such protest. For purposes of section 1582 of Title 28, a protest which has not been allowed or denied in whole or in part within thirty days following the date of mailing by certified or registered mail of a request for accelerated disposition shall be deemed denied on the thirtieth day following mailing of such request.

The defendant concludes from the foregoing statute that the failure of a customs official to either allow or deny a protest within a period of two years from the day of its filing constitutes a constructive denial thereof, causing the 180-day time limitation to automatically begin running on the day immediately following the last day of said two-year period, namely—April 26, 1974. By the time the summons was actually filed on November 7, 1974, the defendant charges that

a total period of 196 days had elapsed thus causing the filing of the summons in question to be untimely.

This court is unable to accept the contention urged by the defendant. It appears that in its reasoning the defendant misconceives the purpose and the intent evidenced by the Congress in the enactment of 19 U.S.C., section 1515(a). The foregoing section relates to the manner in which administrative review shall be conducted and determined by customs officials. It is regulatory in character and prescribes the period of time and the form in which the obligations and responsibilities of these officials are to be performed. The specific obligation is imposed thereby on customs to mail a notice of denial to a protestant. This section does not serve as a statute of limitation with respect to the commencement of an action, but only provides for the act or occurrence from which the 180-day time limitation provided by 28 U.S.C., section 2631(a)(1) begins to run.

It is this latter section (section 2631(a)(1)) which imposes the limitation period on the commencement of a court action and specifies when this period commences. The language of this section is plain and unequivocal. The 180-day limitation period begins to run *not* from the date a protest is denied, but from the date the notice of denial is *mailed* to the plaintiff. Thus, until the independent, though related, obligation to mail the notice of denial is complied with by customs, the corresponding obligation imposed on the plaintiff by 28 U.S.C., section 2631(a)(1), to file a summons within 180 days thereafter does not attach. To accept the defendant's contention that the 180-day limitation period automatically commences by operation of law in cases where no administrative review of a protest occurs within two years of its filing, would not only ignore the unambiguous phraseology of 28 U.S.C., section 2631(a)(1), but would also dispense with the directive contained in 19 U.S.C., section 1515(a) that customs mail notices of denial to protestants in all such cases.

Had Congress intended the automatic commencement of the 180-day limitation period after two years of administrative inaction on a protest by customs, it, indeed, would have expressly so provided. The intent of Congress is clearly evidenced by the contrasting statutory provisions relating to a protest subject to accelerated disposition. 19 U.S.C., section 1515(b) provides that a protest, which has not been allowed or denied within 30 days following the date of mailing of a request for an accelerated disposition is deemed denied. With respect to the protest subject to accelerated disposition, the Congress has placed the affirmative burden on the plaintiff to commence an action by the filing of a summons within 180 days after the date of the constructive denial. No notice of denial is required to be mailed by customs. Accordingly, in the same manner that section 2631(a)(1)

refers to section 1515(a) in order to specifically provide the time and/or occurrence from which the 180-day limitation period commences (date of mailing notice of denial), so in the case of a protest subject to accelerated disposition, section 2631(a)(2) refers to section 1515(b) for the purpose of providing the specific but dissimilar time and/or occurrence from which the 180-day limitation period commences (the 30th day following the mailing of a request for accelerated disposition). To place a construction on 19 U.S.C., section 1515(a) and 28 U.S.C., section 2631(a)(1) where accelerated disposition is not requested, as urged by the defendant, would destroy the very distinction so patently intended by the Congress.

The legislative history of the Customs Courts Act of 1970 illustrates the intent of Congress with respect to the issue presented by the present motion. In its formative stages the Senate Bill 2624, which eventually became the 1970 Act, contained an additional subsection (c) amending section 515 of the Tariff Act of 1930 and providing for the constructive denial of protests after a period of two years without administrative action. The proposed subsection provided in pertinent part:

> Sec. 515. Review of Protests.—
>
> (c) Constructive Denial of Protest.—Any protest which has not been allowed or denied in whole or in part in accordance with paragraph (a) of this section * * * shall be deemed denied after two years have elapsed from the date the protest was filed in accordance with section 514 of this Act. [S. 2624, 91st Cong., 1st Sess. § 208 at pp. 25–26. (Introduced July 14, 1969).]

At the hearings conducted in connection with the proposed Senate Bill, strenuous objection was made with respect to the foregoing provision relating to constructive denial of *all* protests. It was contended that an intolerable burden would be imposed on importers to be required to follow the progress of each and every protest over the period of two years. Senate Hearings on S. 2624, 91st Cong., 1st Sess. at pp. 121, 136, 147, 165, 169 and 175 (1969).

In the report of the Senate Committee on the Judiciary, the proposed subsection (c) amending section 515 of the Tariff Act of 1930, *supra*, was deleted. Senate Report No. 91–576, Amendment No. 14, p. 4 (1969). The reasoning of the Senate Committee is clearly stated in its report at pages 29–30:

> Your Committee has stricken section 515 (c) as it would have been added by S. 2624. That proposed subsection provided that protests which are not affirmed or denied on their merits within 2 years following the date of filing would be deemed denied at the end of that 2 year period. Such a provision would impose on the importer of record the burden of following his protest continuously in order to determine when the 180 day period within

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> which a summons must be filed in the Customs Court begins to run, *as no notice of the expiration of the 2 year period was required.*
>
> In view of the expectation of the Treasury Department that generally protests will not require significantly more time for review than the time required under existing law, *your Committee has eliminated the constructive denial procedure.* Instead, proposed section 515 (a), in the bill as it was introduced, has been revised to impose an obligation on the Bureau of Customs to act on the merits of all protests within 2 years from the date on which they are filed and to mail notice of all denials to the protesting party in each case. [Emphasis supplied.]

In lieu of the deleted subsection (c), the Senate Bill substituted section 112 which as explained on page 17 of the Senate Report, *supra*:

> * * *completely revises section 2631 to title 28, United States Code. It formerly set forth the procedures for appeal to the Customs Court in reappraisement disputes. The new section establishes the time for commencing an action in the Customs Court.
>
> Section 2631 (a) requires that a suit on a protest denied pursuant to section 515 (a) of the Tariff Act of 1930, as amended, be brought within 180 days after the date of mailing of notice of its denial, in whole or in part, or within 180 days after the date of denial of a protest by operation of law pursuant to the provisions of section 515 (b) of the Tariff Act of 1930, as amended.

Thus, in the Customs Courts Act of 1970, as ultimately enacted, the time for the commencement of a court action by the filing of a summons is specifically tied to the mailing of the notice of denial of protest. In every action, other than those actions in which there has been a request for an accelerated disposition under the provisions of 19 U.S.C., section 1515(b), customs has been given the affirmative obligation to notify the importer of the denial of his protest. The mailing of this notice of denial has been made the prerequisite to the commencement of the 180-day time limitation period. See S. Report No. 91–576, 91st Cong., 1st Sess., pp. 17, 29–30 (1969).

The defendant submits that the denial of its motion to dismiss may lead to an anomalous result of allowing customs to delay the mailing of notices of denial *ad infinitum* despite the fact that customs has the affirmative obligation by statute to allow or deny all protests within a period of two years of their filing. The defendant argues at length that the Congress did not foresee such a particular eventuality, thus permitting "a projected construction" of congressional intent beyond and in variance with that expressed in the explicit language of the statute.

Contrary to the hypothesis of defendant's counsel, the report of the Senate Committee evidences that full consideration was given to the two-year period of review of protests granted to customs in the act. In fact, witnesses for the Treasury Department testified that a

majority of all protests were fully processed within 90 days of their receipt. (See S. Report No. 91–576, 91st Cong., 1st Sess., p. 28 (1969).) To ignore explicit statutory language because of an unanticipated possibility that customs willfully or otherwise might fail to mail a notice of denial is not "an act of projection" of legislative intent, as urged by the defendant, but a usurpation of the legislative prerogative by means of judicial construction.

However, a further consideration of such an "anomalous result," as submitted by the defendant, is unnecessary, for in the present proceeding the mailing of a notice of denial is without dispute and, accordingly, not in issue. Moreover, this court is unwilling to presume that customs officials would intentionally be guilty of such bad faith and conduct as would be present where notification of a denial of a protest is withheld specifically to prevent judicial review. The delay in the mailing of a notice of denial in the present case must be presumed to have been inadvertent. The court is confident that the normal standard of diligence by customs officials is one in which both the denial of a protest and the subsequent mailing of notice thereof to the importer occur well within the two-year period contemplated in 19 U.S.C., section 1515(a).

Accordingly, the court is of the opinion that the summons in the above-entitled action was timely filed and that the defendant's motion must be denied.

Let an order be entered accordingly.

ABSTRACTS OF CUSTOMS COURT DECISIONS

Protests

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/1	Newman, J. January 19, 1977	Fedtro, Inc.	68/7164, etc.	Item 682.60 15%	Item 688.40 11.5%	Fedtro, Inc. v. U.S. (C.D. 4548)	New York Multi-purpose battery chargers
P77/2	Watson, J. February 3, 1977	Westwood Import Co., Inc.	72-7-01562	Item 748.20 28%, 25%, 23.5%, 22%, 15%, 13.5%, 11.5% or 10%	Item 774.60 15%, 13.5%, 11.5% or 10%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	San Diego Artificial flowers, etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/3	Richardson, J. February 8, 1977	Samuel Brilliant Co.	69/26185, etc.	Item 700.53 37.5%	Item 700.60 20%	Agreed statement of facts (submitted in court)	Boston Footwear (stock no. 240)
P77/4	Ford, J. February 9, 1977	F.W. Myers & Co.	67/49584	Item 692.35 11.5%	Item 692.06 Free of duty	Agreed statement of facts	Port Huron (Detroit) Automobile trucks valued at $1000 or more, used for transport; Canadian articles
P77/5	Richardson, J. February 16, 1977	Paper Novelty Corp.	74-7-01799	Item 653.95 8.5%	Item 688.40 5.5%	U.S. v. L. Batlin & Son, Inc. (C.A.D. 1111)	New York Tree top light sets
P77/6	Landis, J. February 16, 1977	Ataka America, Inc.	73-7-01908	Item 708.71 22% and 21% Item 708.72 25% and 22% Item 708.73 36%, 31% and 27%	Item 708.80 24%, 21% or 18%	Olympus Corp. of America v. U.S. (C.D. 4538)	New York Various parts of microscopes
P77/7	Re, J. February 16, 1977	Selecta, Inc.	74-6-01447	Item 705.85 15% Item 705.86 35%	Item 735.05 7.5%	Agreed statement of facts	New York Gloves specially designed for use in sports
P77/8	Landis, J. February 24, 1977	Rettrain Imports, Inc.	65/12579S, etc.	Par. 216 15%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	New York Synthetic rubber articles

P77/9	Watson, J. February 24, 1977	Brentwood Originals	70/31121, etc.	Item 366.60 40%, 38% or 36% Item 366.63 50%, 47.5%, 45% or 42.5%	Item 363.30 12.5%, 11.5% or 10.5%	Brentwood Originals v. U.S. (C.D.'s 4572, 4655)	Los Angeles Velveteen and corduroy covers for bolsters and bedrests
P77/10	Watson, J. March 2, 1977	Brentwood Originals	69/34699, etc.	Item 366.60 40% or 38% Item 366.63 50% or 47.5%	Item 363.30 12.5% or 11.5%	Brentwood Originals v. U.S. (C.D.'s 4572, 4655)	Los Angeles Velveteen and corduroy covers for bolsters and bedrests
P77/11	Watson, J. March 2, 1977	Brentwood Originals	69/50804, etc.	Item 366.60 36% Item 366.63 45%	Item 363.30 11%	Brentwood Originals v. U.S. (C.D.'s 4572, 4655)	Los Angeles Velveteen and corduroy covers for bolsters and bedrests
P77/12	Watson, J. March 2, 1977	Brentwood Originals	70/42469, etc.	Item 366.63 50%	Item 363.30 12.5%	Brentwood Originals v. U.S. (C.D.'s 4572, 4655)	Los Angeles Velveteen and corduroy covers for bolsters and bedrests
P77/13	Ford, J. March 3, 1977	Border Brokerage Co., Inc.	74-9-02329	Item 207.00 11.5% (fence sections and fence gates marked "A") Item 202.54 5% (corner adapters and cleats marked "A"; fence posts marked "B")	Item 200.75 Free of duty (items marked "A") Item 200.60 Free of duty (items marked "B")	Arthur J. Humphreys, Inc. v. U.S. (C.D. 4588, aff'd C.A.D. 1168) (items marked "A" and "B")	Blaine (Seattle) Red cedar fence sections, fence gates, etc. (items marked "A") Wood fence posts (items marked "B")
P77/14	Ford, J. March 3, 1977	Carson M. Simon & Co.	67/79138	Item 653.40 19%	Item 653.35 10.5%	U.S. v. Morris Friedman & Co. (C.A.D. 1156)	Philadelphia Candlesticks, candleholders, etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/15	Watson, J. March 3, 1977	Brentwood Originals	69/41531, etc.	Item 366.63 47.5% or 42.5%	Item 363.30 11.5% or 10.5%	Brentwood Originals v U.S. (C.D.'s 4572, 4655)	Los Angeles Velveteen and corduroy covers for bolsters and bedrests
P77/16	Watson, J. March 3, 1977	Brentwood Originals	72-8-01745, etc.	Item 366.60 36%, 34% or 32% Item 366.63 45% or 42.5%	Item 363.30 11%, 10.5% or 10%	Brentwood Originals v. U.S. (C.D.'s 4572, 4655)	Los Angeles Velveteen and corduroy covers for bolsters and bedrests
P77/17	Watson, J. March 3, 1977	Brentwood Originals	73-12-03301	Item 366.60 32% Item 366.63 40% or 38%	Item 363.30 10% or 9.5%	Brentwood Originals v. U.S. (C.D.'s 4572, 4655)	Los Angeles; San Diego Velveteen and corduroy covers for bolsters and bedrests
P77/18	Newman, J. March 8, 1977	Lipman's Imports, Inc.	72-10-02157, etc.	Item 657.20 13%, 11% or 9.5%	Item 653.95 11.5%, 10% or 8.5%	Hancock Gross, Inc. v. U.S. (C.D. 4662)	New York Strainer bases or bodies
P77/19	Newman, J. March 10, 1977	Ehrenreich Photo-Optical Industries, Inc.	73-12-03529	Item 657.20 15%	Item 722.94 8%	Judgment on the pleadings	New York Loaders (entry 960686)
P77/20	Ford, J. March 17, 1977	Morris Friedman & Co. et al.	76-5-01107, etc.	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Philadelphia Candlesticks, candleholders, etc.
P77/21	Watson, J. March 17, 1977	Marubeni America Corp.	74-4-00997	Item 409.00 3.5¢ per lb. + 22.5%	Item 405.25 1.4¢ per lb. + 9%	Volkswagen of America, Inc. v. U.S. (C.D. 4348, aff'd C.A.D. 1115)	Los Angeles Paint mixture

P77/22	Maletz, J. March 17, 1977	Hoyt, Shepston & Sciaroni	72-12-02596	Item 138.00 17.5%	Item 136.91 1.75¢ per lb.	General Freight Services, Inc., a/c Lamb-Weston, Inc., et al. v. U.S. (C.D. 4590)	San Francisco Frozen onions
P77/23	Maletz, J. March 17, 1977	Robert E. Landweer & Co.	73-4-01103	Item 138.00 17.5%	Item 136.91 1.75¢ per lb.	General Freight Services, Inc., a/c Lamb-Weston, Inc., et al. v. U.S. (C.D. 4590)	Seattle Frozen onions
P77/24	Maletz, J. March 17, 1977	Pacific Wine Company	73-10-02991	Item 167.30, 37.5¢ per gal. plus Int. Rev. tax at 17¢ per gal. (wine in entries 120281, 101474, 105522) Item 168.19, 87¢ per gal. plus Int. Rev. tax at $10.50 per gal. (brandy in entry 152852)	Duties and taxes improperly assessed on certain quantities of merchandise—62.5 (entry 120281), 431 (101474), 33 (105522), and 24 gals. (152852)—which never entered U.S.	Agreed statement of facts	Chicago Shortage of alcoholic beverages
P77/25	Ford, J. March 21, 1977	Alexanders Dept. Stores, Inc., et al.	70/39547, etc.	Item 653.37 17%, 15% or 13%	Item 653.35 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D. 1156)	New York Candlesticks, candleholders, etc.
P77/26	Ford, J. March 21, 1977	Morris Friedman & Co. et al.	73-7-01711, etc.	Item 653.37 13%, 11% or 9.5%	Item 653.35 7%, 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Philadelphia Candlesticks, candleholders, etc.
P77/27	Ford, J. March 21, 1977	Shriro Universal Corp. et al.	75-11-03013, etc.	Item 653.37 13% or 9.5%	Item 653.35 7%, 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New York Candlesticks, candleholders, etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/28	Landis, J. March 21, 1977	Pollard Bearings Corporation	72-5-01215	Item 660.90 12%	Item 660.52 8.5%	Pollard Bearings Corporation v. U.S. (C.D. 4619)	Philadelphia; New York Integral shaft bearings (FPS bearings)
P77/29	Newman, J. March 21, 1977	The Ashflash Corporation	72-1-00149, etc.	Item 683.80 13.75%	Item 688.40 8%, 6.5% or 5.5%	Judgment on the pleadings The Ashflash Corporation v. U.S. (C.D. 4643)	New York; Los Angeles Combination lanterns and signalling lights
P77/30	Landis, J. March 22, 1977	Pollard Ball and Roller Bearing Corporation	67/9775, etc.	Item 660.90 12%	Item 660.52 8.5%	Pollard Bearings Corporation v. U.S. (C.D. 4619)	Chicago Integral shaft bearings (FPS bearings)
P77/31	Landis, J. March 22, 1977	Pollard Ball and Roller Bearing Corporation	70/32104, etc.	Item 660.90 12%	Item 660.52 8.5%	Pollard Bearings Corporation v. U.S. (C.D. 4619)	New York Integral shaft bearings (FPS bearings)
P77/32	Landis, J. March 22, 1977	Pollard Bearings Corporation	71-6-00445	Item 660.90 12%	Item 660.52 8.5%	Pollard Bearings Corporation v. U.S. (C.D. 4619)	Chicago; Philadelphia; New York Integral shaft bearings (FPS bearings)
P77/33	Landis, J. March 22, 1977	Pollard Bearings Corporation	71-12-02107	Item 660.90 12%	Item 660.52 8.5%	Pollard Bearings Corporation v. U.S. (C.D. 4619)	Chicago; New York Integral shaft bearings (FPS bearings)
P77/34	Landis, J. March 29, 1977	Pollard Ball and Roller Bearing Corporation	70/41768, etc.	Item 660.90 12%	Item 660.52 8.5%	Pollard Bearings Corporation v. U.S. (C.D. 4619)	Philadelphia Integral shaft bearings (FPS bearings)
P77/35	Watson, J. March 29, 1977	The Newman Co., dba The Newman Imports, Inc., et al.	74-9-02547, etc.	Item 389.60 25¢ per lb.+ 15% or 18%	Item 735.20 10% or 12%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Backpacking tents

P77/36	Watson, J. March 29, 1977	The Newman Importing Co., dba The Newman Co.	75-5-01127, etc.	Item 389.60 25¢ per lb.+ 18% or 15%	Item 735.20 10% or 12%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Backpacking tents
P77/37	Newman, J. March 29, 1977	Fedtro, Inc.	73-12-03482-S	Item 682.60 7.5%	Item 688.40 5.5%	Fedtro, Inc. v. U.S. (C.D. 4548)	New York Multi-purpose battery chargers
P77/38	Watson, J. March 31, 1977	Canvas Specialty Mfg. Co. et al.	75-1-00171, etc.	Item 389.60 25¢ per lb. +15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Backpacking tents
P77/39	Watson, J. March 31, 1977	Westwood Import Co., Inc.	69/19517	Item 748.20 28%	Item 774.60 17%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	San Diego Artificial flowers, etc., of plastic
P77/40	Newman, J. March 31, 1977	Delmonico International Corp. Delmonico International Corp. d/o Elgin National Industries	72-5-00987	Item 685.30 8%	Item 678.50 6%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	New York AM/FM/MPX radio, two speaker changer, etc.
P77/41	Newman, J. March 31, 1977	Delmonico International Corp. Delmonico International Corp. d/o Elgin National Industries	72-12-02592	Item 685.30 8%	Item 678.50 6%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	New York Solid state AM/FM/MPX stereo radio receivers with 8-track players, etc.
P77/42	Newman, J. March 31, 1977	Mitsubeni America Corp.	74-5-01155	Item 771.45 8.5¢ per lb.	Item 771.42 6%	Agreed statement of facts	Los Angeles Cast acrylic sheets and/or sheets of acrylic resin

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/43	Newman, J. April 8, 1977	The Ashflash Corporation	69/21030, etc. 69/41176, etc. 70/32657, etc. 69/40389, etc. 69/43412, etc.	Item 683.80 13.75%	Item 688.40 11.5%, 10%, 9% or 8%	Judgment on the pleadings The Ashflash Corporation v. U.S. (C.D. 4643)	New York; Los Angeles; Seattle Combination lanterns and signalling lights
P77/44	Watson, J. April 20, 1977	Volkswagen of America, Inc.	73-6-01611	Item 409.00 6.3¢ per lb.+ 40%; 4.9¢ per lb.+31%; 4¢ per lb.+ 27%; or 3.5¢ per lb.+ 22.5%	Item 405.25 2.5¢ per lb.+ 16%; 1.9¢ per lb.+12.5%; 1.6¢ per lb.+ 10.5%; or 1.4¢ per lb.+9%	U.S. v. Volkswagen of America, Inc. (C.A.D. 1115)	Baltimore; Honolulu; San Francisco; Philadelphia; Portland, Oreg. Benzenoid alkyd resin paints
P77/45	Ford, J. April 21, 1977	Associated Dry Goods Corp.	71-6-00442, etc.	Item 653.37 13%, 11% or 9.5%	Item 653.35 7%, 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	New York Candlesticks, candleholders, etc.
P77/46	Richardson, J. April 21, 1977	General Instrument Corporation	73-6-01511, etc.	Item 685.20 10%, 9%, 8%, 7%, 6% or 5% (color delay lines, yokes,	As assessed, *supra*, with cost or value of U.S. components (items	General Instrument Corporation v. U.S. (C.A.D. 1128) (items marked "J") General Instrument Corporation v. U.S. (C.D. 4507)	New York; Springfield (Boston); San Francisco American goods returned; color delay lines, yokes, flybacks, tuners, conver-

				flybacks, tuners, convergence box assemblies) Without allowance under item 807.00	marked "F", "J", "K", "M", "P") deductible from full value of imported merchandise pursuant to item 807.00	(items marked "K") Agreed statement of facts (items marked "F", "M", "P")	gence box assemblies; U.S. components marked "F", "J", "K", "M", "P", respectively
P77/47	Richardson, J. April 21, 1977	F. W. Myers & Co., Inc.	74-7-01813	Item 722.50 24%	Item 678.50 7%	Agreed statement of facts	New York No-rewind systems, not parts of projectors; machines
P77/48	Watson, J. April 21, 1977	Volkswagen of America, Inc.	72-7-01531	Item 409.00 6.3¢ per lb.+40%; 5.5¢ per lb.+36%; 4.9¢ per lb.+31%; or 4¢ per lb.+27%	Item 405.25 2.5¢ per lb.+16%; 2.2¢ per lb.+14%; 1.9¢ per lb.+12.5%; or 1.6¢ per lb.+10.5%	U.S. v. Volkswagen of America, Inc. (C.A.D. 1115)	New York; Philadelphia; Los Angeles; Baltimore; Houston; Chicago; Portland, Oreg.; Boston; New Orleans; Honolulu; San Francisco; Jacksonville (Tampa) Benzenoid alkyd resin paints
P77/49	Watson, J. April 21, 1977	Volkswagen of America, Inc.	74-7-01664	Item 409.00 4¢ per lb.+27%	Item 405.25 1.6¢ per lb.+10.5%	U.S. v. Volkswagen of America, Inc. (C.A.D. 1115)	Los Angeles Benzenoid alkyd resin paints
P77/50	Watson, J. April 21, 1977	Zunino Altman, Inc.	67/14887	Item 748.20 28%	Item 774.60 17%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279)	New York Plastic artificial flowers

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/51	Ford, J. April 26, 1977	Arthur J. Humphreys, Inc.	74-9-02326	Item 207.00 11.5% (fence sections and fence gates marked "A") Item 202.54 5% (corner adaptors and cleats marked "A"; fence posts marked "B")	Item 200.75 Free of duty (items marked "A") Item 200.60 Free of duty (items marked "B")	Arthur J. Humphreys, Inc. v. U.S. (C.D. 4588, aff'd C.A.D. 1168) (items marked "A" and "B")	Sumas (Seattle) Red cedar fence sections, fence gates, etc. (items marked "A") Wood fence posts (items marked "B")
P77/52	Ford, J. April 26, 1977	Omscolite Imports, Inc., et al.	63/15758, etc.	Par. 397 19% (items marked "A"); 12% (items marked "B")	Par. 339 12.5% (items marked "A"); 9% (items marked "B")	Ignaz Strauss & Company, Inc. v. U.S. (C.A.D. 923) (items marked "A" and "B")	Philadelphia Candlesticks, candleholders, etc., in c.v. of brass (items marked "A"); in c.v. of tin or tinplate (items marked "B")
P77/53	Ford, J. April 26, 1977	J. T. Steeb & Co., Inc.	74-11-03281	Item 692.35 5.5%	Item 692.30 Duty free	Judgment on the pleadings	Portland, Oreg. Fiat tractors, Model Nos. 640 and 640DT/3-8
P77/54	Newman, J. April 26, 1977	The Ashflash Corporation	72-1-00148, etc.	Item 683.80 13¾%	Item 688.40 8%, 6.5% or 5.5%	Judgment on the pleadings The Ashflash Corporation v. U.S. (C.D. 4643)	New York; Los Angeles; Norfolk; New Orleans; Seattle Combination lanterns and signalling lights

P77/55	Re, C.J. May 4, 1977	New York Merchandise Co., Inc.	75-2-00505	Item 737.90 17.5%	Item 734.20 5.5%	Judgment on the pleadings	Los Angeles "Item 30/6093 jackpot bank slot machine battery operated game machine"
P77/56	Ford, J. May 4, 1977	Metasco, Inc.	74-11-03167	Item 653.37 9.5%	Item 653.35 5%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157)	New York Brass candleholders
P77/57	Watson, J. May 4, 1977	Unitron Import Corp.	68/18993	Item 206.65 16 2/3%	Item 206.30 15%	B. A. McKenzie & Co., Inc. v. U.S. (C.D. 3020)	Los Angeles Wooden louvre or shutter doors
P77/58	Landis, J. May 6, 1977	General Instrument Corporation	71-9-01123-S, etc.	Item 685.80 11% or 10% (capacitors) Item 687.60 11% or 10% (diodes) Item 685.20 9%, 8%, 7% or 6% (yokes, pincushions, color delay lines and certain flybacks) Item 682.05 12.5% (certain flybacks) Without allowance under item 807.00	As assessed, *supra*, with cost or value of U.S. components deductible from full value of imported merchandise pursuant to item 807.00	Agreed statement of facts	New York American goods returned; capacitors, diodes, yokes, flybacks, pincushions, color delay lines; U.S. components
P77/59	Landis, J. May 6, 1977	Mego Corporation	70/27403, etc.	Item 737.90 28%	Item 737.55 16.5%	Agreed statement of facts	New York Toy alphabet blocks, toy building blocks, etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/60	Watson, J. May 6, 1977	Volkswagen of America, Inc.	73-1-00033	Item 409.00 5.5¢ per lb. + 30%; 4.9¢ per lb. +31%; 4¢ per lb. +27%; 3.5¢ per lb. + 22.5%	Item 405.25 2.2¢ per lb. + 14%; 1.9¢ per lb. +12.5%; 1.6¢ per lb. + 10.5%; 1.4¢ per lb. +9%	U.S. v. Volkswagen of America, Inc. (C.A.D. 1115)	New York; Toledo (Cleveland); Portland, Oreg.; Honolulu; Jacksonville (Tampa); San Francisco; New Orleans; Baltimore; Chicago; Washington, D.C. Benzenoid alkyd resin paints
P77/61	Re, C. J. May 10, 1977	Newton Lumber Corp.	69/43090, etc.	Item 727.40 13.5%	Item 202.5 3%	Pacific Hardwood Sales Co. et al. v. U.S. (C.D. 3960)	New York Pieces of hardwood
P77/62	Ford, J. May 10, 1977	Morris Friedman & Co. et al.	67/79134, etc.	Item 653.40 19%	Item 653.35 10.5%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	Philadelphia Candlesticks, candleholders, etc.
P77/63	Ford, J. May 10, 1977	Morris Friedman & Co. et al.	71-12-02093, etc.	Item 653.37 17%, 13%, 11% or 9.5%	Item 653.35 9%, 7%, 6% or 5%	Morris Friedman & Co. v. U.S. (C.D. 4561, aff'd C.A.D. 1156; C.D. 4570, aff'd C.A.D. 1157)	Philadelphia Candlesticks, candleholders, etc.
P77/64	Ford, J. May 10, 1977	Morris Friedman & Co.	72-4-00749, etc.	Item 653.37 13% or 11%	Item 653.35 7% or 6%	Morris Friedman & Co. v. U.S. (C.D. 4561, aff'd C.A.D. 1156; C.D. 4570, aff'd C.A.D. 1157)	Philadelphia Candlesticks, candleholders, etc.
P77/65	Ford, J. May 10, 1977	F. B. Vandegrift & Co., Inc.	68/53763, etc.	653.37 17%, 15% or 13%	653.35 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	Philadelphia Candlesticks, candleholders, etc.
P77/66	Re, C. J.	Importers Acquisition Corp.	73-2-00319, etc.				

P77/66	Re, C. J. May 11, 1977	Importers Associates, Inc.	73-8-02442	Item 705.85 15%	Item 735.05 9% and 7.5% (Nos. 815, 715 and 615) Item 734.97 14.5% (Nos. 869, 769 and 669)	Agreed statement of facts	New York Snowmobile gloves: ski gloves
P77/67	Ford, J. May 11, 1977	The American Import Co.	08/53731	Item 653.37 17%	Item 653.35 9%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Philadelphia Candlesticks, candleholders, etc.
P77/68	Ford, J. May 11, 1977	Morris Friedman & Co.	71-7-00498	Item 653.37 13% or 11%	Item 653.35 7% or 6%	Morris Friedman & Co. v. U.S. (C.D. 4561, aff'd C.A.D. 1156; C.D. 4570, aff'd C.A.D. 1157)	Philadelphia Candlesticks, candleholders, etc.
P77/69	Ford, J. May 11, 1977	Gimbel Bros., Inc.	71-10-01438, etc.	Item 653.37 15%, 13%, 11% or 9.5%	Item 653.35 8%, 7%, 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	New York Candlesticks, candleholders, etc.
P77/70	Watson, J. May 11, 1977	The Newman Importing Company et al.	72-2-00362, etc.	Item 389.60 25¢ per lb. + 27%, 24% 21% or 18%	Item 735.20 18%, 16%, 14% or 12%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Backpacking tents
P77/71	Ford, J. May 16, 1977	Amco Custom Brokerage Co.	69/5378, etc.	Item 653.37 17% or 15%	Item 653.35 9% or 8%	U.S. v. Morris Friedman & Co. (C.A.D.1157)	Philadelphia Candlesticks, candleholders, etc.
P77/72	Ford, J. May 16, 1977	The American Import Co.	75-8-02034	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Philadelphia Candlesticks, candleholders, etc.
P77/73	Ford, J, May 16, 1977	W. J. Byrnes & Company et al.	70/28105 etc.	Item 653.37 17% or 15%	Item 653.35 9% or 8%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Seattle Candlesticks, candleholders, etc.

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/74	Ford, J. May 16, 1977	Morris Friedman & Co.	67/8904	Item 653.40 19%	Item 653.35 10.5%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	Philadelphia Candlesticks, candleholders, etc.
P77/75	Ford, J. May 16, 1977	Morris Friedman & Co.	70/7169	Item 653.37 15%	Item 653.35 8%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	Philadelphia Candlesticks, candleholders, etc.
P77/76	Ford, J. May 17, 1977	Adelphia Lamps & Shades, Inc.	76-1-00059	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Philadelphia Candlesticks, candleholders, etc.
P77/77	Ford, J. May 17, 1977	Guild of Israeli Craftsmen et al.	75-12-03311, etc.	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Philadelphia Candlesticks, candleholders, etc.
P77/78	Ford, J. May 17, 1977	Keer, Maurer Co. et al.	70/2621, etc.	Item 653.37 17%, 15% or 13%	Item 653.35 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D. 1156)	Philadelphia Candlesticks, candleholders, etc.
P77/79	Ford, J. May 18, 1977	C.A.B. Import & Export Co., Inc., et al.	71-11-01719, etc.	Item 653.37 15%, 13%, 11% or 9.5%	Item 653.35 8%, 7%, 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Seattle Candlesticks, candleholders, etc.
P77/80	Ford, J. May 18, 1977	Shopping International, Inc., et al.	71-11-01779, etc.	Item 653.37 13%, 11% or 9.5%	Item 653.35 7%, 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D. 1157)	New York Candlesticks, candleholders, etc.

P77/81	Landis, J. May 18, 1977	Exhibit Sales, Inc.	70/44307	Item 653.39 19%	Protest dismissed as to all entries; appraisement and liquidation not in accordance with law as to entry 148608; said entry ordered returned to district director for appropriate administrative action and valid liquidation	Mobilite, Inc. v. U.S. (C.R.D. 73-11)	Philadelphia Lamps imported with electrical light bulbs; not entireties
P77/82	Landis, J. May 24, 1977	Ataka America, Inc., et al.	75-11-02922, etc.	Item 708.71, 708.72, 708.73, 708.75 22%, 21%, 20%; 27%, 25%, 22%, 20%; 36%, 31%, 27%, 22.5%; 22.5%	Item 708.80 24%, 21%, 18% or 15%	Olympus Corp. of America v. U.S. (C.D. 4538)	New York Various parts of microscopes
P77/83	Maletz, J. May 24, 1977	American Laubscher Corp.	69/22520	Item 720.94 32.5%	Item 680.45 9%	American Laubscher Corp. et al. v. U.S. (C.D. 4006)	New York Pinions and gears, and assemblies thereof
P77/84	Maletz, J. May 24, 1977	Nadel & Sons Toy Corp.	68/38714, etc.	Item 737.90 31%, 24% or 17.5%	Item 734.20 9%, 7% or 5.5%	Mego Corp. v. U.S. (C.A.D. 1137)	New York "Pin ball game" or "bagatelle game"; game machines

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/85	Ford, J. June 6, 1977	The Emporium Capwell Company et al.	69/39303, etc.	Item 653.37 17%, 15% or 13% Item 653.40 19%	Item 653.35 10.5%, 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	San Francisco Candlesticks, candleholders, etc.
P77/86	Ford, J. June 6, 1977	Jack Housman, Inc.	70/31481, etc.	Item 653.37 15%	Item 653.35 8%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Dallas (Houston) Candlesticks, candleholders, etc.
P77/87	Ford, J. June 6, 1977	Mark Ross & Co. et al.	68/59478, etc.	Item 653.37 17%, 15%, 13%, 11% or 9.5% Item 653.40 19%	Item 653.35 10.5%, 9% or 8%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	San Francisco Candlesticks, candleholders, etc.
P77/88	Ford, J. June 7, 1977	The Candlestick et al.	70/07582, etc.	Item 653.37 17% or 15%	Item 653.35 10.5%, 9% or 8%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	San Francisco Candlesticks, candleholders, etc.
P77/89	Ford, J. June 7, 1977	General Time Corp.	70/21706	Item 730.93 14%	Item 680.45 7%	American Laubscher Corp. et al. v. U.S. (C.D. 4006)	Atlanta (Savannah) Pinions and gears
P77/90	Maletz, J. June 7, 1977	Nadel & Sons Toy Corp.	68/46974, etc.	Item 737.90 35%, 31% or 28%	Item 734.20 11%, 9% or 8%	Mego Corp. v. U.S. (C.A.D. 1137)	New York "Pin ball game" or "bagatelle game"; game machines.
P77/91	Landis, J. June 8, 1977	Byer-Rolnick	76-9-01955	Item 702.37 10%	Item 702.40 6¢ per doz. pcs. +5%	Judgment on the pleadings	Dallas (Houston) "Panama hatbodies"

P77/92	Watson, J. June 8, 1977	Brentwood Originals	74-7-01729, etc.	Item 366.60 40% Item 366.63 32%	Item 363.30 10%	Brentwood Originals v. U.S (C.D.'s 4572, 4655)	Los Angeles Velveteen and corduroy covers for bolsters and bedrests
P77/93	Watson, J. June 8, 1977	Teters Floral Products Co., Inc., et al.	74-9-02672, etc.	Item 748.20 21%	Item 774.60 8.5%	Joseph Markovits, Inc. v. U.S. (C.D. 4396) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Armbee Corporation et al. v. U.S. (C.D. 3278)	Tacoma (Seattle) Plastic artificial flowers, etc.
P77/94	Newman, J. June 8, 1977	The Ashflash Corporation	73-2-00531, etc.	Item 683.80 13¾%	Item 688.40 9%, 6.5% or 5.5%	Judgment on the pleadings The Ashflash Corporation v. U.S. (C.D. 4643)	New York; Seattle; Los Angeles Combination lanterns and signalling lights
P77/95	Ford, J. June 14, 1977	C. M. Import & Export Corp.	65/16394	Par. 1531 20%	Par. 353 12.5% Radio cases and radios not appraised as entireties: appraisement and liquidation void; protest premature and dismissed; entry ordered returned to customs officer for appropriate administrative action	Judgment on the pleadings Lafayette Radio Electronics Corp. v. U.S. (C.A.D. 977)	San Francisco Radio cases imported with radios; entireties

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/06	Ford, J. June 14, 1977	C. M. Import & Export Corp.	65/20770	Par. 1531 20%	Par. 353 12.5% Radio cases and radios not appraised as entireties; appraisements and liquidations void; protest premature and dismissed; entries ordered returned to customs officer for appropriate administrative action Protest overruled as to entry WHB 2560	Judgment on the pleadings Lafayette Radio Electronics Corp. v. U.S. (C.A.D. 977)	San Francisco Radio cases imported with radios; entireties
P77/07	Ford, J. June 14, 1977	Nomura (America) Corp et al.	64/25163, etc.	Par. 1531 20%	Par. 353 12.5% Radio cases and radios not appraised as en-	Judgment on the pleadings Lafayette Radio Electronics Corp. v. U.S. (C.A.D. 977)	New York Radio cases imported with radios; entireties

					tireties; appraisements and liquidations void; protests premature and dismissed; entries ordered returned to customs officer for appropriate adminsitrative action		
P77/98	Ford, J. June 14, 1977	Nomura (America) Corp. et al.	68/7262, etc.	Item 706.08 20%	Item 685.22 12.5% Radio cases and radios not appraised as entireties; appraisements and liquidations void; protests premature and dismissed; entries ordered returned to customs officer for appropriate administrative action	Judgment on the pleadings Lafayette Radio Electronics Corp. v. U.S. (C.A.D. 977)	New York Radio cases imported with radios; entireties

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/99	Ford, J. June 14, 1977	Universal Transcontinental Corp.	66/25503-S	Par. 353 12.5%	Radio cases and radios not appraised as entireties; appraisement and liquidation void; protest premature and dismissed; entries ordered returned to customs officer for appropriate administrative action	Judgment on the pleadings	New York Radio cases imported with radios; entireties
P77/100	Maletz, J. June 14, 1977	Montgomery Ward & Co.	75-2-00345	Item 685.30 6.5%	Item 678.50 5%	Judgment on the pleadings	New York Model No. 62-6254 deluxe AM/FM track player with full size changer cutout; model No. 62-6284 AM/FM stereo 8-track with changer cutout
P77/101	Maletz, J. June 14, 1977	Nichimen Co., Inc.	75-2-00389	Item 685.30 6.5%	Item 678.50 5%	Judgment on the pleadings	Los Angeles Model TG-440 "Electrophonic" brand AM/FM/MPX radio receiver with 8-track player

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77/102	Ford, J. June 16, 1977	Amco Custom Brokerage Co.	68/58698	Item 653.37 17%	Item 653.35 9%	U.S. v. Morris Friedman & Co. (C.A.D. 1156)	Philadelphia Candlesticks, candleholders, etc.
P77/103	Ford, J. June 16, 1977	David Komisar & Son, Inc.	73-7-01700	Item 646.60 15.5% or 13%	Item 646.49 12.5%	Summary judgment (motion to incorporate Trans-Atlantic Company v. U.S. (C.D. 4344) and David Komisar & Son, Inc., et al. v. U.S. (C.D. 4674) and motion for summary judgment granted)	New York Screws for use in wood
P77/104	Ford, J. June 16, 1977	Otagiri Mercantile Co., Inc., et al.	72-5-01194, etc.	Item 653.37 13% or 11%	Item 653.35 7% or 6%	U.S. v. Morris Friedman & Co. (C.A.D. 1156)	New York Candleholders
P77/105	Newman, J. June 16, 1977	Fedtro, Inc.	68/52462	Item 682.60 15%	Item 688.40 11.5%	Fedtro, Inc. v. U.S. (C.D. 4548)	New York Multi purpose battery chargers
P77/106	Ford, J. June 23, 1977	Rickberg Hansen, Inc., et al.	70/46500, etc.	Item 653.40 19% Item 653.37 17% or 15%	Item 653.35 10.5%, 9% or 8%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	San Francisco Candlesticks, candleholders, etc.
P77/107	Watson, J. June 30, 1977	Teters Floral Products	74-5-01151, etc.	Item 748.20 22% or 21%	Item 774.60 10% or 8.5%	Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Seattle Plastic artificial flowers, etc.
P77/108	Watson, J. June 30, 1977	Washington Quilt Co. et al.	71-11-01732, etc.	Item 389.60 25¢ per lb. + 21%, 18% or 15%	Item 735.20 14%, 12% or 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Seattle; San Francisco Backpacking tents
P77/109	Newman, J. June 30, 1977	Mallory Battery Co.	76-12-02842	Item 683.80 13.75%	Item 688.40 5.5%	The Ashflash Corporation v. U.S. (C.D. 4643)	New York Lanterns

ABSTRACTS OF CUSTOMS COURT DECISIONS

Reappraisements

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/1	Richardson, J. January 13, 1977	Great Empire Corp.	R63/4153, etc.	Cost of production	Appropriate value listed in column designated "Claimed Value (In Deutsch Marks Per Car)" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	New York Various model Volkswagen automobiles
R77/2	Richardson, J. January 26, 1977	Drexel Motors, Inc.	R65/25383	Cost of production	3363.00 Deutsch Marks (for each model 113); invoice unit price (model 311)	U.S. v. F & D Trading Corp. (C.A.D. 1089)	New York Volkswagen automobiles (18 model 113; one model 311)
R77/3	Richardson, J. January 26, 1977	Great Empire Corp.	R65/23561	Cost of production	3494.48 Deutsch Marks for each automobile	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Jacksonville (Tampa) Volkswagen automobiles, model 113
R77/4	Watson, J. January 26, 1977	H.A. & J.L. Wood	73-8-02148	Export value	Various invoice values less duty or other nondutiable charges included in said invoice values	J. L. Wood v. U.S. (C.A.D. 1139)	Pembina Engine heaters, car warmers, etc.

R77/5	Maletz, J. Decided on remand January 26, 1977	J. C. Penney Purchasing Corporation	74–3–00848 [C.D. 4671; reh. granted and action remanded 11/29/76 as to style No. 200 pant suit]	Export value	$39, net packed, for each set covered by entry 105936 $38, net packed, for each set covered by entry 107247	Order on stipulation	San Francisco Ladies wearing apparel; style No. 200 (each set comprised of pants, shell, jacket); entirety
R77/6	Ford, J. February 3, 1977	H. A. & J. L. Wood	72–7–01574, etc.	Export value	Various invoice values less duty or other nondutiable charges included in said invoice values	J. L. Wood v. U.S. (C.A.D. 1139)	Pembina Engine heaters, car warmers, etc.
R77/7	Richardson, J. February 9, 1977	Drexel Motors, Inc.	72–9–01906	Cost of production.	Appropriate value listed in column designated "Claimed Value" on schedule attached to decision and judgment, for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	New York Various model BMW automobiles
R77/8	Richardson, J. February 9, 1977	F & D Trading Corp.	R65/22774, etc.	Cost of production.	Appropriate value listed in column designated "Claimed Value (In Deutsch Marks Per Car)" on schedule attached to decision and judgment	U.S. v F & D Trading Corp. (C.A.D. 1089)	Jacksonville (Tampa) Various model Volkswagen automobiles

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/9	Ford, J. February 14, 1977	Drexel Motors, Inc.	R68/12818	Cost of production	3868.00 DM each for 8 model 1200 (113) Volkswagens; 5085.00 DM each for 8 model 311 Volkswagens; appraised value for each of 18 miscellaneous model Volkswagens	Judgment on the pleadings	New York Volkswagen automobiles
R77/10	Ford, J. February 14, 1977	F & D Trading Corp.	R63/7801	Cost of production	3344.00 DM each for 5 model 113 Volkswagens; 3433.12 DM each for 25 model 117 Volkswagens; appraised value for each of 26 miscellaneous model Volkswagens	Judgment on the pleadings	New York Volkswagen automobiles
R77/11	Landis, J. February 14, 1977	Brown, Alcantar & Brown, Inc., a/c RCA Record Division.	R69/12064, etc.	Constructed value	Set forth in schedule C attached to decision and judgment	Brown, Alcantar & Brown, Inc., et al. v. U.S. (A.R.D. 306)	El Paso Phonograph records
R77/12	Landis, J. March 2, 1977	M. J. Feldman, Inc.	R67/13444	Constructed value	$5.62 (radio receivers), $0.08 (earphones), and $0.10 (batteries) each	Agreed statement of facts	New York Solid-state (tubeless) radio receivers, earphones, batteries

R77/13	Ford, J. March 17, 1977	F. W. Myers & Co., Inc.	72-8-01758	Export value	Values set forth under column "Unit Value" on schedule A attached to decision and judgment	Agreed statement of facts	Champlain-Rouses Pt. (Ogdensburg) Titanium dioxide pigments
R77/14	Watson, J. March 17, 1977	H. A. & J. L. Wood	73-10-02891	Export value	Various invoice values less duty or other nondutiable charges included in said invoice values	J. L. Wood v. U.S. (C.A.D. 1139)	Pembina Engine heaters, car warmers, etc.
R77/15	Richardson, J. March 31, 1977	Delta Steel, Inc.	R65/22372	Cost of production	DM 3372.00 (type 113); DM 3444.47 (type 117)	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Jacksonville (Tampa) Volkswagen autmobiles
R77/16	Richardson, J. March 31, 1977	E. Dillingham, Inc.	75-8-02173	Constructed value	Invoiced unit value of $0.90 (Canadian Currency) per lb., net, packed	Agreed statement of facts	Alexandria Bay (Ogdensburg) Capran 77 "O" mill roll nylon film
R77/17	Richardson, J. March 31, 1977	Lone Star Finance Corporation	R62/3825, etc.	Cost of production	As specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles (types 113 and 117)
R77/18	Richardson, J. March 31, 1977	Henry Pollak, Inc.	R62/9909, etc.	American selling price	Set forth under column "Unit Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Various articles of footwear

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/19	Maletz, J. March 31, 1977	Pflueger Sporting Goods Marketing Div. of Shakespeare Company	72-5-01104, etc.	United States value	U.S. $0.35 per gross packed ready for delivery (no. 4005 fish hook assortment in tins and fish hook assortment in polybags exported during 1969); U.S. $0.36 per gross packed ready for delivery (no. 4005 fish hook assortment in tins and fish hook assortment in polybags exported during 1970); U.S. $0.82 per gross packed ready for delivery (no. 4006 fish hook assortment in plastic box exported during 1969)	Agreed statement of facts	Akron (Cleveland); Cleveland Fish hooks
R77/20	Re, C.J. April 20, 1977	S. S. Pennock Co. et al.	75-4-00990, etc.	Export value	Chrysanthemums, 12¢ per flower, net packed; carnations—6¢ (select), 5¢ (fancy), 4¢ (standard), 2¢ (short), 5¢ (other), per stem, net packed; pompons, 60¢ per bunch, net packed (covered by actions on schedule A attached to decision and judgment)	Agreed statement of facts	Miami Cut flowers

					Entries marked with an "*" in schedule A not liquidated; protests premature; actions dismissed; entries returned to district director for further administrative action Certain protests not denied; Court No. 75-2-01062 dismissed as to such protests		
R77/21	Re, C.J. April 20, 1977	J. T. Steeb & Co.	R65/21004, etc.	Export value	Net appraised value less 7½%, net packed	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	Longview (Portland, Oreg.) Japanese plywood
R77/22	Richardson, J. April 21, 1977	Lone Star Finance Corp.	R65/23179, etc.	Cost of production	As specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles (types 113 and 117)
R77/23	Richardson, J. April 21, 1977	Patrick & Graves	R66/1682, etc.	Cost of production	As specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles (types 113 and 311)
R77/24	Richardson, J. April 21, 1977	Patrick & Graves	R66/22059	Cost of production	DM 3590.97 (type 113); DM 5044.74 (type 361)	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles (types 113 and 361)

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	UNIT OF VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/25	Watson, J. April 21, 1977	Sandoz, Inc.	R65/18323, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/26	Watson, J. April 21, 1977	Sandoz, Inc.	R67/2090, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R77/27	Watson, J. April 21, 1977	Sandoz, Inc.	R67/8239, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

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R77/28	Re, C.J. April 26, 1977	F. W. Woolworth Co.	76-3-00566	Export value	Invoice unit prices without addition for buying commission	Agreed statement of facts	San Francisco Kitchen tool sets
R77/29	Ford, J. April 26, 1977	J. L. Wood	R69/1175, etc.	Export value	Various invoice values less duty or other nondutiable charges included in said invoice values	J. L. Wood v. U.S. (C.A.D. 1139)	Pembina Engine heaters, car warmers, etc.
R77/30	Richardson, J. April 26, 1977	Patrick & Graves	R65/23166, etc.	Cost of production	As specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F&D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles (types 113 and 117)
R77/31	Re, C. J. May 12, 1977	The Beton Co. et al.	288928-A, etc.	Export value	Net appraised value less 7¼%, net packed	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	San Francisco Japanese plywood
R77/32	Re, C. J. May 12, 1977	The Beton Co. et al.	R61/14844, etc.	Export value	Net appraised value less 7¼%, net packed	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	San Francisco Japanese plywood
R77/33	Re, C. J. May 12, 1977	Castelazo & Associates et al.	R58/1277, etc.	Export value	Net appraised value less 7¼%, net packed	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	Los Angeles Japanese plywood
R77/34	Re, C. J. May 12, 1977	Dant & Russell, Inc., et al.	R60/10004, etc.	Export value	Net appraised value less 7¼%, net packed	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	Houston Japanese plywood

R77/35	Re, C. J. May 12, 1977	Del Valle Kahman & Co. et al.	R58/19723, etc.	Export value	Net appraised value less 7¼%, net packed	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	Longview (Portland, Oreg.) Japanese plywood
R77/36	Re, C. J. May 12, 1977	Pan Pacific Overseas Corp.	R60/2671	Export value	Net appraised value less 7¼%, net packed	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	Longview (Portland, Oreg.) Japanese plywood
R77/37	Watson, J. May 16, 1977	Sandoz, Inc.	R67/3250, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/38	Richardson, J. May 17, 1977	Page & Jones, Inc.	R61/13062, etc.	Cost of production	DM3420.17 (no. 113); DM3504.94 (no. 117)	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Mobile Americanized Volkswagen automobiles (model nos. 113 and 117)

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/39	Richardson, J. May 17, 1977	G. L. Smith, d/b/a Snuffy Smith Motor Co.	R63/3486, etc.	Cost of production	DM3344.00 (no. 113); DM3429.65 (no. 117)	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Jacksonville (Tampa) Americanized Volkswagen automobiles (model nos. 113 and 117)
R77/40	Richardson, J. May 17, 1977	Snuffy Smith Motors	R61/6586, etc.	Cost of production	DM3420.17 (no. 113); DM3504.94 (no. 117); DM3598.00 (no. 143)	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Jacksonville (Tampa) Americanized Volkswagen automobiles (model nos. 113, 117 and 143)
R77/41	Landis, J. May 24, 1977	F. W. Myers & Co., Inc.	75-3-00643	Export value	$28.50 per CWT (U.S. currency) less 1% cash discount, less freight of $1.45 per CWT (Canadian currency) less brokerage and duty included	Agreed statement of facts	Port Huron (Detroit) Titanium dioxide pigments
R77/42	Richardson, J. June 6, 1977	Patrick & Graves	R65/23713, etc.	Cost of production	DM3349.00 (type 113, 1964); DM3494.48 (type 113, 1965 and 1966)	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles, type 113
R77/43	Ford, J. June 14, 1977	F. W. Myers & Co., Inc.	73-2-00385	Export value	$26.00 per CWT less 1% cash discount, less freight of $1.45 per CWT, less brokerage and duty included	Agreed statement of facts	Champlain-Rouses Pt. (Ogdensburg) Titanium dioxide pigments

R77/44	Ford, J. June 14, 1977	F. W. Myers & Co., Inc.	73-3-00685	Export value	$26.00 per CWT (U.S. currency), less 1% cash discount, less freight of $1.45 per CWT (Canadian currency), less brokerage and duty included	Agreed statement of facts	Port Huron (Detroit) Titanium dioxide pigments
R77/45	Ford, J. June 14, 1977	F. W. Myers & Co., Inc.	73-6-01558	Export value	Set forth under column "Claimed Value" on schedule attached to decision and judgment	Agreed statement of facts	Port Huron (Detroit); Champlain-Rouses Pt. (Ogdensburg) Titanium dioxide pigments
R77/46	Ford, J. June 14, 1977	F. W. Myers & Co., Inc.	73-11-03049	Export value	$26.00 per CWT (U.S. currency), less 1% cash discount, less freight of $1.45 per CWT (Canadian currency), less brokerage and duty included	Agreed statement of facts	Champlain-Rouses Pt. (Ogdensburg) Titanium dioxide pigments
R77/47	Maletz, J. June 16, 1977	F. W. Myers & Co., Inc.	74-5-01331	Export value	$27.00 per CWT (U.S. currency), less 1% cash discount, less freight of $1.45 per CWT (Canadian currency), less brokerage and duty included	Agreed statement of facts	Port Huron (Detroit) Titanium dioxide pigments
R77/48	Ford, J. June 23, 1977	H. A. & J. L. Wood	74-12-03316, etc.	Export value	Various invoice values less duty or other nondutiable charges included in said invoice values	J. L. Wood v. U.S. (C.A.D. 1139)	Pembina Engine heaters (with or without cords), car warmers, etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/49	Watson, J. June 29, 1977	Sandoz, Inc.	R65/18308, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/50	Watson, J. June 29, 1977	Sandoz, Inc.	R65/18327, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R77/51	Watson, J. June 29, 1977	Sandoz, Inc.	R65/20635, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/52	Watson, J. June 30, 1977	Sandoz, Inc.	R65/16046, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/53	Maletz, J. June 30, 1977	Westinghouse Electric Corp.	75-4-00816	Constructed value	$6.75 (cigarette lighters-radio), $2.68 (watch movements), for each imported article, net, packed	Judgment on the pleadings	New York Cigarette lighters-radio; watch movements

Amendments to rules 3.6(b), 4.12(c), 8.3(b), 9.1(d), 14.6(c) and (e), 14.8(b), (c) and (e), and the deletion of rule 14.7(d) have been approved by the court. The amended rules, effective September 1, 1977, will read as follows (deletions in brackets; new language underscored):

RULE 3.6 TIME

* * * * * * *

(b) Extension:

(1) [Except as provided in Rules 14.6(e) and 14.8(e),] When, by these rules or by a notice given thereunder or by order of the court, an act is required or allowed to be done at or within a specified time, the court may upon motion, for good cause shown, order the period extended.

(2) Every motion for extension of time must set forth therein the specific number of additional days requested, the date to which the extension is to run, the extent to which the time for the performance of the particular act has been previously extended, and the reason or reasons upon which the motion for extension is based, and shall be filed [no later than 5 days] prior to the expiration of the period allowed for the performance of the act to which the motion relates (including any previous extension of time). An objection or response thereto shall be filed within [5] 10 days after service of such motion. The foregoing requirement as to filing may be wavied by the court upon a showing, in a separate motion for leave to file out of time, that the delay in filing was the result of excusable neglect or circumstances beyond the control of the party.

(3) A moving party may obtain oral consent from the adversary party to the extension of time requested and, if obtained, shall so state in the moving papers. In such case the adversary party is not required to file any response to the motion, but may do so, if he so desires within 10 days after service of such motion.

(4) No disposition shall be made until the court acts upon the motion for extension of time.

(5) If the motion for an extension of time is denied and less than [5] 10 days remain of the time to perform the act, or the time to perform the act has expired, the act may be performed within [5] 10 days after the court enters the order denying the extension of time.

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RULE 4.12 MOTION PRACTICE

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(c) Time To Respond: [Except as provided in Rules 3.6(b), 14.6(e) and 14.8(e),] An objection or response to a contested motion shall be filed within 10 days after service of such motion, except that

an objection or response to a dispositive motion, i.e., a motion to dismiss the action, a motion for judgment on the pleadings, and a motion for summary judgment, shall be filed within 30 days after service of such motion. On a dispositive motion the moving party shall have 15 days from the date of service of the objections or response to file a reply.

* * * * * * *

RULE 8.3 DISMISSAL OF ACTIONS

* * * * * * *

(b) Involuntary Dismissal:

(1) Actions in the reserve file or suspension disposition file are subject to dismissal at the expiration of the applicable period of time in accordance with Rule 14.6 or Rule 14.8.

(2) An unassigned action in which issue has been joined, but no further proceedings have been instituted for a period of 1 year, [may] shall be dismissed [by the court on its own motion] for lack of prosecution, and unless [good cause is shown for such delay.] the plaintiff has pending a motion for extension of time, the clerk shall enter an order of dismissal without further direction of the court.

At least 30 days prior to the entry of an order of dismissal, the clerk shall send notice to the parties informing them that the action will be dismissed in accordance with this rule.

For good cause shown the court may, upon motion, order an extension of time solely for the purpose of moving the action toward a final disposition by trial or otherwise, upon such terms and within such time as the court may direct.

(3) Whenever it shall appear that [an] any assigned or unassigned action is not being prosecuted with due diligence, the court may, either upon its own motion or upon motion of the defendant, order the action dismissed for lack of prosecution.

(4) For failure of the plaintiff to comply with these rules or with any order of the court, the defendant may move that the court dismiss the action.

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RULE 9.1 NOTICE OF TRIAL

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(d) Objection to Date or Place: Any other party to the action who prefers the trial to be held at a place or on a date other than that requested in the notice of trial, shall, within 15 days after service of the notice of trial, file a request showing the other place where, or the other date when, he would prefer the trial to be held, together with a statement of the reasons for the request, and shall include in such request an estimate of the time that will probably be required for the examination of his witnesses at such other place or on such

other date. If the responding party does not file an objection to a notice of trial, he shall estimate the time for examination and cross-examination of his witnesses.

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RULE 14.6 RESERVE FILE

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(c) Dismissal for Lack of Prosecution: An action which is not removed from the reserve file within a period of 2 years shall be dismissed for lack of prosecution, and unless [the plaintiff] either party has [pending] a motion pending, [for extension of time,] the clerk shall enter an order of dismissal without further direction of the court. The applicable 2-year period shall begin to run from the last day of the month in which the action is commenced, and shall end on the last day of the 24th month thereafter. No order of dismissal shall be entered under this rule until the court has acted on the pending motion. If the pending motion is denied and less than 10 days remain, or the time has expired for removing such action from the reserve file pursuant to paragraph (b) of this rule, then the action shall continue to remain in the reserve file for 10 days after the court enters the order denying the motion.

* * * * * * *

(e) Motion for Extension of Time: For good cause shown, the court may, upon motion, order an extension of the time, beyond the applicable 2-year period, within which an action may remain in the reserve file. Any motion for extension of time shall be filed with the clerk prior to the expiration of the period of time. An objection or response thereto shall be filed within [5] 10 days after service of such motion. A moving party may obtain oral consent from the adversary party to the extension of time requested and, if obtained, shall so state in the moving papers. In such case the adversary party is not required to file any response to the motion, but may do so, if he so desires within 10 days after service of such motion. No order of dismissal shall be entered under Rule 14.6(c) until the court has acted on the motion. If the motion for extension of time is denied and less than 10 days remain, or the time has expired, for removing such action from the reserve file pursuant to paragraph (b) of this rule, then the action shall continue to remain in the reserve file for 10 days after the court enters the order denying the extension of time.

RULE 14.7 SUSPENSION PROCEDURE

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[(d) Denial of Motion: [Delete entire rule.]]

(d) Effect of Suspension: An order suspending an action shall stay all further proceedings and filing of papers therein, unless the court directs otherwise.

(e) Removal from Suspension: A suspended action may be removed from suspension by filing (1) a complaint, (2) notice of trial after issue is joined, or (3) submission of the action to the court for decision upon an agreed statement of facts. Upon motion of a party for removal from suspension for the purpose of moving the action toward a final disposition by trial or otherwise, the court may order the removal upon such terms and within such time as it may direct.

RULE 14.8 SUSPENSION DISPOSITION FILE

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(b) Removal from Suspension Disposition File: An action may be removed from a suspension disposition file upon: (1) the [filing] granting of a motion for removal; or (2) the filing of a complaint or answer subsequent to suspension pursuant to Rule 4.4; or (3) the granting of a motion for consolidation pursuant to Rule 10.3 or for suspension under another action pursuant to Rule 14.7(b); or (4) submission of the action to the court for decision upon an agreed statement of facts pursuant to Rule 8.1 or upon the [filing] granting of a dispositive motion; or (5) the filing of a notice of trial pursuant to Rule 9.1. Such motion for removal shall be made solely for the purpose of moving the action toward a final disposition by trial or otherwise, upon such terms and within such time as the court may direct. The motion shall specify the further proceedings desired to be taken and shall be submitted together with a proposed order specifying such further proceedings. A motion for removal or any other motion made pursuant to this paragraph shall be filed [no later than 15 days] prior to the expiration of the time within which the action may remain in the suspension disposition file. An objection or response to a motion for removal shall be filed within 10 days after service of the motion.

An objection or response to a dispositive motion shall be filed within 30 days.

No order of dismissal shall be entered under Rule 14.8(c) until the court has acted upon the motion made pursuant to this paragraph. If the motion is denied and less than 10 days remain, or the time has expired, for removing the action from the suspension disposition file, then the action shall continue to remain in the suspension disposition file for 10 days after the court enters the order denying the motion.

(c) Dismissal for Lack of Prosecution: An action which is not removed from the suspension disposition file within a fixed period of time shall be dismissed for lack of prosecution, and unless [the plaintiff] either party has [pending] a motion pending, [for extension of time,] the clerk shall enter an order of dismissal without further direction of the court. The period of time, not to exceed 18 months, within which an action may remain in the suspension disposition file

shall be fixed by the judge to whom the action has been assigned, or by the judge who decided the action under which the actions transferred to the suspension disposition file were suspended. No order of dismissal shall be entered under this rule until the court has acted on the pending motion. If the pending motion is denied and less than 10 days remain, or the time has expired for removing such action from the suspension disposition file pursuant to paragraph (b) of this rule, then the action shall continue to remain in the suspension disposition file for 10 days after the court enters the order denying the motion.

* * * * * * *

(e) Motion for Extension of Time: For good cause shown, the court may, upon motion, order an extension of time beyond the applicable fixed period of time within which an action may remain in the suspension disposition file. A motion for extension of time shall be filed with the clerk prior to the expiration of the period of time. An objection or response thereto shall be filed within [5] 10 days after service of such motion. A moving party may obtain oral consent from the adversary party to the extension of time requested and, if obtained, shall so state in the moving papers. In such case the adversary party is not required to file any response to the motion, but may do so, if he so desires within 10 days after service of such motion. No order of dismissal shall be entered under Rule 14.8(c) until the court has acted on the motion. If the motion for extension of time is denied and less than 10 days remain, or the time has expired, for removing said action from the suspension disposition file pursuant to paragraph (b) of this rule, then the action shall continue to remain in the suspension disposition file for 10 days after the court enters the order denying the extension of time.

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AMERICAN GOODS RETURNED
ADVANCED IN VALUE (*see* AMERICAN GOODS RETURNED, C.D. 4692).
AIRPLANES

Importer sought to establish a duty-free entry for the American-made components of an imported DC–9 airplane notwithstanding its noncompliance with applicable customs regulations.

On the record presented on rehearing, and having found that the evidence established (1) that the district director had not *refused* to permit entry of the aircraft in issue under TSUS item 800.00 as claimed by the importer but had given an opinion solicited by the importer's customs broker to the effect that the aircraft would be treated as a fully dutiable importation, and the importer had elected to make a dutiable entry of the aircraft on the basis of such administrative opinion, and (2) that the returned airplane appeared to have been modified while in service in a foreign country so as to be advanced in value or improved in condition upon its return to the United States, the court held there was no basis in law or in fact to warrant disturbing the decision and judgment entered in the case which overruled the importer's claim for duty-free entry under item 800.00. Decision and judgment in C.D. 4604 to stand. *McDonnell Douglas Corp.*, C.D. 4692-- 92

Rehearing denied June 15, 1977.

DUTY ALLOWANCE

Certain Z-beams, products of the United States, were processed in Mexico into floating sills and thereafter assembled into railroad cars classified as railroad and railway rolling stock under item 690.15, Tariff Schedules of the United States. Plaintiff did not dispute the said classification but claimed a duty allowance of $395.22 per car in the appraisement under item 807.00, TSUS. The claimed allowance is for the cost or value of 400 Z-beams which were first processed in Mexico into floating center sills, and thereafter assembled into the imported railroad cars.

On the record presented the court held that the imported merchandise failed to qualify as articles exported in condition ready for assembly without further fabrication and as having not been advanced in value or improved in condition abroad except by being assembled and except by operations such as cleaning, lubricating and painting as required by clauses (a) and (c) of item 807.00 of the tariff schedules. Accordingly, the protests were overruled. *Rudolph Miles*, C.D. 4689---------- 35

Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77–18.

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SPECIAL DUMPING DUTIES, LEGALITY OF

Defendant moved for partial summary judgment as to one of two causes of action in a civil action wherein plaintiff had challenged the legality of special dumping duties that were assessed under the Antidumping Act of 1921, as amended (19 U.S.C. 160 et seq.) against certain asbestos cement pipe which was imported from Japan.

In that cause of action, plaintiff contended that the Tariff Commission's determination of injury, a necessary precondition to the assessment of dumping duties, was invalid under 19 U.S.C. 160(a) on the ground that it was achieved by a two to two vote of the five Commissioners who attended the meeting on the injury question, while the fifth Commissioner present at the meeting declined to vote. Plaintiff filed a cross-motion for summary judgment. The court held that the Tariff Commission's determination of injury was valid as a matter of law; that it was not necessary for all six of the Tariff Commission's members to participate in any given meeting in order for the Commission to take valid action; and that a majority was sufficient. Accordingly, defendant's motion for partial summary judgment as to plaintiff's first cause of action was granted and plaintiff's cross-motion for summary judgment was denied. *Voss International Corp.*, C.D. 4698 ---------- 130

ASBESTOS CEMENT PIPE (*see* ANTIDUMPING ACT OF 1921, AS AMENDED, C.D. 4698).

BENT PIPE (*see PIPE AND PIPE FITTINGS, C.D.* 4686).

BOUNTY, INDIRECT (*see COUNTERVAILING DUTY, C.D.* 4691).

CANDIED PINEAPPLE
PRESERVED PINEAPPLE

Certain merchandise invoiced as "Drained preserved pineapple" was classified as candied, crystallized, or glace fruits under item 154.45, Tariff Schedules of the United States, as modified by T.D. 68–9, and was claimed to be prepared or preserved pineapple under TSUS item 148.98, as modified.

On the record presented, the court held the importations were properly classified as candied pineapple, inasmuch as they contained between 72.4% and 74% of soluble sugar solids, were produced by the so-called slow-impregnation process, and were primarily used in baking for fruitcakes and for making higher concentrated glace and crystallized fruit. Accordingly, plaintiff's claim was overruled. *S & T Imports, Inc.*, C.D. 4690 ---------- 45

CAST IRON, COLUMNS, PILLARS, POSTS AND SIMILAR STRUCTURAL UNITS OF (*see* ILLUMINATING ARTICLES AND PARTS, OF BASE METAL, OTHER, C.D. 4702).

CHIEF USE, AMUSEMENT (*see* INFLATABLE FLOATS—TOYS, C.D. 4688).

CLASSIFICATION
DETERMINED BY CONDITION AS IMPORTED (*see* PIPE AND PIPE FITTINGS, C.D. 4686).

COLUMNS (*see* ILLUMINATING ARTICLES AND PARTS, OF BASE METAL, OTHER, C.D. 4702).

COMMODITY TAX, REMISSION, EXEMPTION (*see* COUNTERVAILING DUTY, C.D. 4691).

COMMON MEANING
CANDIED (*see* CANDIED PINEAPPLE, C.D. 4690).
CANDIED FRUITS (*see* CANDIED PINEAPPLE, C.D. 4690).
CANDYING PROCESS (*see* CANDIED PINEAPPLE, C.D. 4690).
GLACED FRUITS (*see* CANDIED PINEAPPLE, C.D. 4690).

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ANTIDUMPING ACT OF 1921, AS AMENDED (19 U.S.C. 160 et seq.) (*see* ANTIDUMPING ACT OF 1921, AS AMENDED, C.D. 4698).
CODE OF FEDERAL REGULATIONS, TITLE 37, SEC. 6.2 (*see* INFLATABLE FLOATS—TOYS, C.D. 4688).
CUSTOMS COURTS ACT OF 1970, SEC. 108 (*see* COUNTERVAILING DUTY, C.D. 4691).
CUSTOMS SIMPLIFICATION ACT OF
1950 (*see* COUNTERVAILING DUTY, C.D. 4691).
1951 (*see* COUNTERVAILING DUTY, C.D. 4691).
GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)
ANNEX I, AD ARTICLE XVI, 1955 (*see* COUNTERVAILING DUTY, C.D. 4691).
PT. II, ARTICLE VI(4) (*see* COUNTERVAILING DUTY, C.D. 4691).
JAPANESE COMMODITY TAX LAW—CITED AS COMMODITY TAX LAW
(March 31, 1962, Law No. 48), as revised (*see* COUNTERVAILING DUTY, C.D. 4691).
PUBLIC LAW 89–806 (*see* AMERICAN GOODS RETURNED, C.D. 4689).
RULES OF THE U.S. CUSTOMS COURT
Rule
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4.12 (*see* COUNTERVAILING DUTY, C.D. 4691).
4.13 (*see* COUNTERVAILING DUTY, C.D. 4691).
8.2
(*see* COUNTERVAILING DUTY, C.D. 4691).
(*see* VINYL SHOE UPPERS, C.D. 4687).
TARIFF ACT OF
1890, par. 237, 26 Stat. 567, 584 (*see* COUNTERVAILING DUTY, C.D. 4691).
1894, par. 182½, 28 Stat. 509, 521 (*see* COUNTERVAILING DUTY, C.D. 4691).
1897, sec. 5, 30 Stat. 151, 205 (*see* COUNTERVAILING DUTY, C.D. 4691).
1909, sec. 6, 36 Stat. 11, 85 (*see* COUNTERVAILING DUTY, C.D. 4691).
1913, par. E, 38 Stat. 114, 193 (*see* COUNTERVAILING DUTY, C.D. 4691).
1922, sec. 303, 42 Stat. 858, 935 (*see* COUNTERVAILING DUTY, C.D. 4691).
1930
Par. 327 (*see* PIPE AND PIPE FITTINGS, C.D. 4686).
Par. 919 (*see* VINYL SHOE UPPERS, C.D. 4687).
Par. 1559 (*see* VINYL SHOE UPPERS, C.D. 4687).
Par. 1615(a) (*see* AMERICAN GOODS RETURNED, C.D. 4689).
Sec. 303, 46 Stat. 590, 687 (*see* COUNTERVAILING DUTY, C.D. 4691).
Sec. 402(d), AS AMENDED BY THE CUSTOMS SIMPLIFICATION ACT OF 1956 (*see* PIPE AND PIPE FITTINGS, C.D. 4686).
Sec. 514 (*see* AMERICAN GOODS RETURNED, C.D. 4689).
AS AMENDED, U.S.C., title 19, sec. 1514 (*see* PIPE AND PIPE FITTINGS, C.D. 4686).
Sec. 516 (*see* COUNTERVAILING DUTY, C.D. 4691).
TARIFF SCHEDULES OF THE UNITED STATES
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10(c) (*see* PIPE AND PIPE FITTINGS, C.D. 4686).
10(c)(h) (*see* VINYL SHOE UPPERS, C.D. 4687).
10(h) (*see* ON-FARM BULK MILK TANKS, C.D. 4693).
10(ij)
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(*see* ON-FARM BULK MILK TANKS, C.D. 4693).
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154.45 (*see* CANDIED PINEAPPLE, C.D. 4690).

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382.06 (*see* LADIES SWEATERS, C.D. 4701).
389.60 (*see* NYLON TENNIS STRING, C.D. 4699).
405.25 (*see* URETHANE PASTES, C.D. 4685).
406.70 (*see* URETHANE PASTES, C.D. 4685).
409.00 (*see* URETHANE PASTES, C.D. 4685).
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610.80 (*see* PIPE AND PIPE FITTINGS, C.D. 4686).
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653.35 (*see* ILLUMINATING ARTICLES AND PARTS, OF BASE METAL, OTHER, C.D. 4702).
653.37 (*see* ILLUMINATING ARTICLES AND PARTS, OF BASE METAL, OTHER, C.D. 4702).
653.39 (*see* ILLUMINATING ARTICLES AND PARTS, OF BASE METAL, OTHER, C.D. 4702).
657.20 (*see* PIPE AND PIPE FITTINGS, C.D. 4686).
658.00 (*see* UNWROUGHT SILICON, C.D. 4695).
661.35 (*see* ON-FARM BULK MILK TANKS, C.D. 4693).
666.00 (*see* ON-FARM BULK MILK TANKS, C.D. 4693).
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700.55 (*see* VINYL SHOE UPPERS, C.D. 4687).
706.60 (*see* PICNIC BAGS, C.D. 4694).
734.88 (*see* NYLON TENNIS STRING, C.D. 4699).
737.90 (*see* INFLATABLE FLOATS—TOYS, C.D. 4688).
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774.60
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(*see* VINYL SHOE UPPERS, C.D. 4687).
790.39 (*see* INFLATABLE FLOATS—TOYS, C.D. 4688).
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U.S. CODE
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Sec. 160(a) (*see* ANTIDUMPING ACT OF 1921, AS AMENDED, C.D. 4698).
Sec. 160(b) (*see* ANTIDUMPING ACT OF 1921, AS AMENDED, C.D. 4698).
Sec. 1330(c) (*see* ANTIDUMPING ACT OF 1920, AS AMENDED, C.D. 4698).
Sec. 1514(b) (*see* URETHANE PASTES, C.D. 4685).
Title 28
Sec. 1582(a)
(*see* PIPE AND PIPE FITTINGS, C.D. 4686).
(*see* URETHANE PASTES, C.D. 4685).
Sec. 1582(c) (*see* URETHANE PASTES, CD. 4685).
Sec. 2635 (*see* PIPE AND PIPE FITTINGS, C.D. 4686).
Sec. 2635(a) (*see* INFLATABLE FLOATS—TOYS, C.D. 4688).
U.S. CODE ANNOTATED
Title 19
Sec. 162 (*see* COUNTERVAILING DUTY, C.D. 4691).
Sec. 1303 (*see* COUNTERVAILING DUTY, C.D. 4691).
Sec. 1514(b)(1) (*see* MOTION TO DISMISS ACTION, C.D. 4696).
Sec. 1516(d) (*see* COUNTERVAILING DUTY, C.D. 4691).
Sec. 1520(c)(1) (*see* MOTION TO DISMISS ACTION, C.D. 4696).
Sec. 2101 (*see* COUNTERVAILING DUTY, C.D. 4691).
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Sec. 255 (*see* COUNTERVAILING DUTY, C.D. 4691).
Sec. 2631(a) (*see* MOTION TO DISMISS ACTION, C.D. 4696).
CONSUMER ELECTRONIC PRODUCTS
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CONSUMPTION TAX, REBATE, REMISSION (*see* COUNTERVAILING DUTY, C.D. 4691).
COUNTERVAILING DUTY
JAPANESE COMMODITY TAX, REMISSION OF
RICHARDSON, J.—Consumer electronic products of a kind produced in the United States by plaintiff, an American manufacturer, were produced in and exported from Japan into the United States, and were classified and assessed in liquidation with regular duties under the Tariff Schedules of the United States. Plaintiff petitioned the Secretary of the Treasury for the imposition of countervailing duties on such imported products in accordance with 19 U.S.C. Annotated, sec. 1303. Following the denial of its administrative petition, plaintiff instituted an action pursuant to 19 U.S.C.A., sec. 1516(d), as amended by the Trade Act of 1974, for judicial review of the negative counter-

COUNTERVAILING DUTY—Continued Page
JAPANESE COMMODITY TAX, REMISSION OF—Continued
vailing duty determination of the Secretary of the Treasury. Motion and cross-motion for summary judgment were filed by the parties.
Finding the record disclosed that under the Japanese Commodity Tax Law (March 31, 1962, Law No. 48), as revised, a single-stage consumption tax, ranging in amount from 5 to 40 percent, is levied at the manufacturing level on a fairly extensive list of consumer goods, inclusive of the imported products, and that upon exportation of these products from Japan the consumption tax is either remitted if previously paid, or is abated if not paid, the court held that the remission and abatement of consumption taxes by the Japanese Government under Commodity Tax Law No. 48 constitute the payment of a bounty or grant within the meaning of section 1303. *Downs* v. *United States*, 187 U.S. 496 (1930) followed. Accordingly, plaintiff's motion was granted; defendant's cross-motion denied.
NEWMAN, J.—Concurring—As a matter of law the remission of the Japanese commodity tax on the subject electronic products constitutes a bounty or grant under section 303, Tariff Act of 1930, as amended (19 U.S.C.A., 1303). The direct-indirect tax dichotomy (and the discredited underlying tax shifting assumptions) upon which the Treasury's administration of the countervailing law has been premised has no economic or legal justification.
BOE, J.—Concurring—In the Trade Act of 1974 (19 U.S.C., sec. 2101), under which statute we are guided in this action, Congress has laid to rest with finality any question as to its intent with respect to the construction of the countervailing duty statute. It is clear that the Congress has reaffirmed its approval of the judicial construction placed upon the countervailing duty statutes of the United States. At the same time, however, a procedure is provided to assist in the resolution of international problems relating to bounties, grants and subsidies through negotiation and the establishment of international agreed rules. *Zenith Radio Corporation*, C.D. 4691 ---------- 59
Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77–19.
CROSS-MOTION FOR SUMMARY JUDGMENT
SUMMARY JUDGMENT, MOTION FOR
(*see* ILLUMINATING ARTICLES AND PARTS, OF BASE METAL, OTHER, C.D. 4702).
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(*see* VINYL SHOE UPPERS, C.D. 4687).
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DUMPING DUTIES, ASSESSMENT OF (*see* ANTIDUMPING ACT OF 1921, AS AMENDED, C.D. 4698).
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CLASSIFICATION (*see* PIPE AND PIPE FITTINGS, C.D. 4686).
DISMISS ACTION (*see* MOTION TO DISMISS ACTION, C.D. 4696).
DRAINED PRESERVED PINEAPPLE (*see* CANDIED PINEAPPLE, C.D. 4690).
DUMPING DUTIES, ASSESSMENT OF
DETERMINATION OF INJURY, TARIFF COMMISSION (*see* ANTIDUMPING ACT OF 1921, AS AMENDED, C.D. 4698).
DUTY
ALLOWANCE (*see* AMERICAN GOODS RETURNED, C.D. 4689).
COUNTERVAILING (*see* COUNTERVAILING DUTY, C.D. 4691).
EVIDENCE, SAMPLE WITHOUT TESTIMONIAL SUPPORT (*see* LADIES SWEATERS, C.D. 4701).
EXPORT SUBSIDY (*see* COUNTERVAILING DUTY, C.D. 4691).
FARM MILK TANKS IMPORTED WITHOUT REFRIGERATION UNITS (*see* ON-FARM BULK MILK TANKS, C.D. 4693).
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STEMS, GAS LAMP (*see* ILLUMINATING ARTICLES AND PARTS, OF BASE METAL, OTHER, C.D. 4702).
TOPS, GAS LAMP (*see* ILLUMINATING ARTICLES AND PARTS, OF BASE METAL, OTHER, C.D. 4702).
GRANT (*see* COUNTERVAILING DUTY, C.D. 4691).
HYPERPURE MONOCRYSTALLINE SILICON
INGOTS (*see* UNWROUGHT SILICON, C.D. 4695).
RODS (*see* UNWROUGHT SILICON, C.D. 4695).
ILLUMINATING ARTICLES AND PARTS, OF BASE METAL
LAMPS, INCANDESCENT (*see* ILLUMINATING ARTICLES AND PARTS, OF BASE METAL, OTHER, C.D. 4702).
OTHER
LAMPS, OTHER (*see* ILLUMINATING ARTICLES AND PARTS, OF BASE METAL, OTHER, C.D. 4702).
STREET LAMPS, PARTS OF
Cross-motions were filed as to consolidated cases submitted on a stipulation of facts, involving the question as to proper classification of parts of street lamps that were designed to be operated by gas.
Certain gas lamp stems and tops were classified under item 653.39 of the Tariff Schedules of the United States covering other illuminating articles and parts thereof of base metal. Relying on general interpretative rule 10(ij), TSUS, plaintiff claimed classification under TSUS item 652.93, which provides, among other things, for columns, pillars, posts, beams, girders and similar structural units. Alternatively, plaintiff claimed classification under TSUS item 653.30, which is contained under the superior heading "Illuminating articles and parts thereof, of base metal:", covering incandescent lamps, designed to be operated by gas. As to the imported gas lamp tops, plaintiff claimed classification under TSUS item 653.30.
Based upon the record presented and congressional intent, the court held that the imported stems were not the type of article to be covered by TSUS item 652.93; that by virtue of the superior heading, item 653.30 of the tariff schedules provides for parts, and therefore the imported lamp stems and tops were properly classifiable under TSUS item 653.30. Accordingly, defendant's motion for summary judgment was denied and plaintiff's cross-motion was granted. *Paul M. W. Bruckmann*, C.D. 4702 ---------- 155
Cross-appealed to U.S. Court of Customs and Patent Appeals, Appeals 77–26 and 77–30.
IMPROVEMENT IN CONDITION (*see* AMERICAN GOODS RETURNED, C.D. 4692).
INDIRECT BOUNTY OR GRANT (*see* COUNTERVAILING DUTY, C.D. 4691).
INFLATABLE FLOATS—TOYS
CHIEF USE, AMUSEMENT
Importation described as inflatable baby tender chair or Ideal's Baby-Me Play Float was classified as a toy under item 737.90, Tariff Schedules of the United States, and was claimed to be classifiable as pneumatic mattresses and other inflatable articles, not specially provided for, under item 790.39 of the said tariff schedules.
On the record presented the court held that the imported merchandise came within the scope of item 737.90, as a toy; that plaintiff had failed to establish that the chief use of the involved articles was other than amusement; and that the presumption of correctness attaching to the classification by customs was not overcome. Accordingly, these consolidated actions were dismissed. *Ideal Toy Corp.*, C.D. 4688 ------- 28
ITEMS NOT SEPARATELY INVOICED OR ENTERED
SEPARABILITY OF APPRAISEMENT (*see* PIPE AND PIPE FITTINGS, C.D. 4686).
JAPANESE COMMODITY TAX, REMISSION OF (*see* COUNTERVAILING DUTY, C.D. 4691).

JUDICIAL REVIEW OF DECISION OF SECRETARY OF TREASURY (*see* COUNTERVAILING DUTY, C.D. 4691). Page

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LACK OF; MOTION TO DISMISS FOR (*see* MOTION TO DISMISS ACTION, C.D. 4696).

LACK OF JURISDICTION, MOTION TO DISMISS FOR (*see* MOTION TO DISMISS ACTION, C.D. 4696).

LADIES SWEATERS
ORNAMENTATION
Certain ladies cotton knit sweaters with double banded neck imported from Hong Kong were classified as women's ornamented wearing apparel under item 382.00, Tariff Schedules of the United States, and were claimed to be classifiable as women's wearing apparel, not ornamented, under TSUS item 382.06.
On the record presented, the court held the merchandise not classifiable as claimed under item 382.06, where the only evidence adduced by the importer was a sample sweater exhibiting a double banded neck which would not be revealing, upon ocular inspection by a lay person, of any latent functional characteristics. There being nothing in the testimony of the Government's witness which would affect favorably the importer's burden of proof, the court dismissed the action. *International Fashions*, C.D. 4701---------- 153

LAMPPOSTS (*see* ILLUMINATING ARTICLES AND PARTS, OF BASE METAL, OTHER, C.D. 4702).

LAMPS
INCANDESCENT (*see* ILLUMINATING ARTICLES AND PARTS, OF BASE METAL, OTHER, C.D. 4702).
OTHER (*see* ILLUMINATING ARTICLES AND PARTS, OF BASE METAL, OTHER, C.D. 4702).

LAWN-TENNIS EQUIPMENT, PARTS OF (*see* NYLON TENNIS STRING, C.D. 4699).

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Of 1950, 5 (*see* COUNTERVAILING DUTY, C.D. 4691).
Of 1951, 5 (*see* COUNTERVAILING DUTY, C.D. 4691).
CONGRESSIONAL RECORD, 1897, VOL. 30, PAGES 316–318, 2204, 2224, 2825 (*see* COUNTERVAILING DUTY, C.D. 4691).
EXECUTIVE BRANCH GATT STUDIES, SENATE COMMITTEE ON FINANCES, 93D CONG., 2D SESS. (1974), PP. 11–12 (*see* COUNTERVAILING DUTY, C.D. 4691).
EXPLANATORY NOTES TO THE BRUSSELS NOMENCLATURE, 1955, VOL. III, CHAPTER 84.15 (*see* ON–FARM BULK MILK TANKS, C.D. 4693).
HOUSE REPORT NO. 93–571, 93D CONG., 1ST SESS. 69, 75–76 (1973) (*see* COUNTERVAILING DUTY, C.D. 4691).
NOTES ON TARIFF REVISION (1908), P. 834 (*see* COUNTERVAILING DUTY, C.D. 4691).
PARTS OF ILLUMINATING ARTICLES (*see* ILLUMINATING ARTICLES AND PARTS, OF BASE METAL, OTHER, C.D. 4702).
PROTOCOL OF PROVISIONAL APPLICATION OF THE GATT, 61 STAT. A2051 (1947) (*see* COUNTERVAILING DUTY, C.D. 4691).
SENATE REPORT
No. 530, TARIFF SCHEDULES TECHNICAL AMENDMENTS ACT (1965) (*see* ON–FARM BULK MILK TANKS, C.D. 4693).
No. 1619, 85th Cong., 2d Sess. (1958) (*see* ANTIDUMPING ACT OF 1921, AS AMENDED, C.D. 4698).
No. 93–1298, 93d Cong., 2d Sess. 72 (1974) (*see* COUNTERVAILING DUTY, C.D. 4691).
SUMMARIES OF TARIFF INFORMATION (1948)
Vol. 3, part 2 (*see* PIPE AND PIPE FITTINGS, C.D. 4686).
Vol. 7, part 4 (*see* CANDIED PINEAPPLE, C.D. 4690).

LEGISLATIVE HISTORY—Continued Page
SUMMARIES OF TRADE AND TARIFF INFORMATION (1969), SCHEDULE 1, VOL. 8, P. 275 (*see* CANDIED PINEAPPLE, C.D. 4690).
TARIFF CLASSIFICATION STUDY, 1960
Schedule 6, part 4, subpart A, p. 260 (*see* ON-FARM BULK MILK TANKS, C.D. 4693).
Schedule 7, part 1, subpart D, pp. 47, 51 (*see* PICNIC BAGS, C.D. 4694).
UNITED STATES TARIFF COMMISSION'S REPORT TO THE PRESIDENT, CANDIED, CRYSTALLIZED OR GLACE FRUITS, REPORT NO. 74, SECOND SERIES, 1934, P. 3 (*see* CANDIED PINEAPPLE, C.D. 4690).
LIMITATION ON PROTEST FILINGS (*see* MOTION TO DISMISS ACTION, C.D. 4696).
LUGGAGE (*see* PICNIC BAGS, C.D. 4694).
MAN-MADE FIBER, NOT SPECIALLY PROVIDED FOR (*see* NYLON TENNIS STRING, C.D. 4699).
MONOCRYSTALLINE SILICON
INGOTS (*see* UNWROUGHT SILICON, C.D. 4695).
RODS (*see* UNWROUGHT SILICON, C.D. 4695).
MOTION
AND CROSS-MOTION FOR SUMMARY JUDGMENT (*see* COUNTERVAILING DUTY, C.D. 4691).
TO DISMISS
Action; limitation on protest filings
Pursuant to rule 4.7 of the rules of the court defendant filed a motion to dismiss action for lack of jurisdiction; plaintiff opposed motion.
The court held that an action commenced by an importer on the basis of the second of two protests filed against entries of plastic visors will be dismissed on jurisdictional grounds on motion of the government made before answer where the record shows that the only effective protest filed against said entries in accordance with 19 U.S.C.A. § 1514(b)(1) which authorizes the filing of only one protest was the initial protest concerning which no judicial review was sought by the importer following administrative denial, and which could have been amended to include the additional claim under 19 U.S.C.A. § 1520 sought to be advanced by the importer by means of the second protest. Accordingly, defendant's motion was granted and action dismissed. *Walker Enterprises, Ltd.*, C.D. 4696---------- 119
For lack of jurisdiction (*see* MOTION TO DISMISS ACTION, C.D. 4696).
NYLON TENNIS STRING
MAN-MADE FIBER, NOT SPECIALLY PROVIDED FOR
Certain merchandise invoiced as "nylon tennis string" was classified as man-made fiber not specially provided for under item 389.60, Tariff Schedules of the United States, and was claimed to be classifiable as parts of lawn-tennis equipment under TSUS item 734.88.
The court noted that for tariff purposes, racket strings that are parts of lawn-tennis equipment include only such as are "put up and packaged for retail sale" in small quantities for ultimate consumers, citing *Lyons Export and Import, Inc. v. United States*, 65 Cust. Ct. 394, 398, C.D. 4111 (1970), *aff'd* 59 CCPA 142, C.A.D. 1056, 461 F.2d 830 (1972). On the record presented, the court held that plaintiff failed to establish that, in the condition imported, the nylon string was put up and packaged for retail sale in small quantities to ultimate consumers and failed to overcome the presumption that the nylon string was properly classified under TSUS item 389.60. Accordingly, the action was dismissed. *Ed Alexander*, C.D. 4699---------- 137
ON-FARM
BULK MILK TANKS
Farm milk tanks imported without refrigeration units
Certain farm milk tanks imported without refrigeration units, which are domestically supplied and attached at the farm, were classified as "refrigerators and refrigerating equipment, whether or not electric, and parts thereof", under item 661.35, Tariff Sched-

ON-FARM—Continued
BULK MILK TANKS—Continued
Farm milk tanks imported without refrigeration units—Continued Page
ules of the United States. Plaintiff claimed that the merchandise was entitled to entry free of duty under TSUS item 666.00 as * * * on-farm equipment for the handling * * * of agricultural * * * products, and agricultural * * * implements not specially provided for and parts of any of the foregoing."
The court held that the tanks were not unfinished refrigerators as the absence of the refrigerator portion was both substantial and essential; and that they were not parts of refrigerators since both provisions of item 666.00, claimed by plaintiff, while generic, are sufficiently specific designations as to prevent classification as parts under General Interpretative Rule 10(ij). Accordingly, the protest claim for free entry under item 666.00 was sustained. *The De Laval Separator Company*, C.D. 4693 95
Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77–20.
EQUIPMENT (*see* ON-FARM BULK MILK TANKS, C.D. 4693).
ORNAMENTATION (*see* LADIES SWEATERS, C.D. 4701).
OTHER ARTICLES OF PLASTICS NOT SPECIALLY PROVIDED FOR
PLASTICS (*see* PICNIC BAGS, C.D. 4694).
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ILLUMINATING ARTICLES; LEGISLATIVE HISTORY (*see* ILLUMINATING ARTICLES AND PARTS, OF BASE METAL, OTHER, C.D. 4702).
LAWN-TENNIS EQUIPMENT (*see* NYLON TENNIS STRING, C.D. 4699).
PICNIC BAGS
LUGGAGE
Certain plastic picnic bags having handles and zipper closures were classified as luggage under item 706.60, Tariff Schedules of the United States, and were claimed to be classifiable as other articles of plastics not specially provided for under TSUS item 774.60.
Based upon the record presented and legislative history, the court held that the imported articles were properly classified as luggage under item 706.60; and that the utilization of language in the legislative history to include bags fitted for dining and drinking was indicative of an intent to include within subpart D, schedule 7, part 1, Tariff Schedules of the United States, luggage or travel goods used for those purposes. Accordingly, plaintiff's claim was overruled. *Prepac, Inc.*, C.D. 4694 108
Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77–22
PILLARS (*see* ILLUMINATING ARTICLES AND PARTS, OF BASE METAL, OTHER, C.D. 4702).
PINEAPPLE, DRAINED PRESERVED (*see* CANDIED PINEAPPLE, C.D. 4690).
PIPE
AND PIPE FITTINGS; SEPARABILITY OF APPRAISEMENT
Various articles consisting of bent pipe, articulation joints and reducers were imported from Japan for installation in a pen stock system, i.e., a conduit for conducting water used in a power project. They were appraised at single unit values net packed, on the basis of constructed value as defined in section 402(d) of the Tariff Act of 1930, as amended. Plaintiff did not dispute the basis of appraisement but alleged that the appraisements were separable.
The bent pipe was classified under item 610.80, Tariff Schedules of the United States, as pipe fittings of iron or steel, and the articulation joints and reducers were classified under item 657.20 of the said tariff schedules, a basket provision for articles of iron or steel, and were claimed to be classified under item 610.32 of the tariff schedules, as pipes of iron or steel.
The court held that the appraisements were not separable, as the various articles either were not separately invoiced or entered, or their appraised values were not separately listed. The court further held that the bent pipe, the reducers and articulation joints were classifi-

PIPE—Continued
AND PIPE FITTINGS; SEPARABILITY OF APPRAISEMENT—Continued Page
able under item 610.32 of the tariff schedules, as pipes of iron or steel since the bent pipe is used to alter the direction of flow and is more than mere pipe and is comparable to elbows. The articulation joints come within the meaning of pipe as provided for in item 610.32 of the tariff schedules, and as to the reducers, based on various lexicographic sources, prior judicial decisions and legislative history, come within the understanding of pipe fittings. Accordingly, the classification of the bent pipe was affirmed, the classification of the articulation joints was overruled and held properly classifiable as claimed by plaintiff, and as to the reducers, plaintiff's claim was dismissed without affirming the classification. *Mitsubishi International Corp.*, C.D. 4686 ---------- 4
BENT PIPE (*see* PIPE AND PIPE FITTINGS, C.D. 4686).
PLASTIC
(*see* PICNIC BAGS, C.D. 4694).
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REFRIGERATORS AND REFRIGERATING EQUIPMENT (*see* ON-FARM BULK MILK TANKS, C.D. 4693).
REMISSION AND ABATEMENT OF TAXES (*see* COUNTERVAILING DUTY, C.D. 4691).
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(*see* VINYL SHOE UPPERS, C.D. 4687).
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UNWROUGHT SILICON

MONOCRYSTALLINE SILICON INGOTS

Certain hyperpure monocrystalline silicon ingots were classified under item 658.00, Tariff Schedules of the United States, as articles of base metals not provided for elsewhere in subpart G of part 3, schedule 6, and were claimed to be classifiable as unwrought silicon, containing by weight over 99.7 percent of silicon, under TSUS item 632.43.

On the record presented the court held that the importations, which were centerless ground to comply with customers' diameter specifications and flatted to identify the crystal orientation, were within the purview of headnotes 3(a) of part 2, schedule 6, TSUS, and properly dutiable under TSUS item 632.43, as unwrought silicon, rather than under TSUS item 658.00, the basket provision for base metal articles. Accordingly, the claim of the plaintiff was sustained. *Wacker Chemical Corporation*, C.D. 4695 ---------- 113

URETHANE PASTES

PLASTICS MATERIALS

Certain urethane pastes were classified under item 409.00, Tariff Schedules of the United States, as mixtures and were claimed to be classifiable under item 405.25 TSUS, as plastics materials. Plaintiff moved for summary judgment on the ground that there was an absence of issue of material fact.

The court held that the involved pastes were plastic materials because they could form plastic articles by themselves and are therefore more than just mixtures and colors. Accordingly, plaintiff's motion for summary judgment was granted. *Mobay Chemical Corp.*, C.D. 4685 ---- 1

Rehearing granted June 6, 1977.

Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77–24.

VINYL SHOE UPPERS

FOOTWEAR (*see* VINYL SHOE UPPERS, C.D. 4687).

WEARING APPAREL

Certain vinyl shoe uppers intended for use and actually used as footwear for children after being subjected to manufacturing were classified as wearing apparel not specially provided for under item 772.30, Tariff Schedules of the United States, and were claimed to be classifiable as footwear having uppers of rubber or plastics under item 700.55 of the Tariff Schedules, or as leather cut or wholly or partly manufactured into forms or shapes suitable for conversion into footwear by virtue of the similitude provision set forth in item 798.00 of the tariff schedules or as articles not specially provided for, or rubber or plastics under item 774.60 of the said tariff schedules. Plaintiff moved for summary judgment pursuant to rule 8.2 of the rules of the court and defendant cross-moved for summary judgment pursuant to said rule.

The court found that the provision for footwear being more specific than that of wearing apparel should prevail under General Interpretative Rule 10(c) if properly subject under either provision and that the imported merchandise did not constitute an unfinished article under either item 772.30 or 700.55 of the tariff schedules, nor under item 798.00 of the tariff schedules as forms or shapes suitable for conversion into footwear by similitude, and held that the proper classification was under item 774.60 of the tariff schedules. Accordingly, plaintiff's motion for summary judgment was granted to that extent. *The Westminster Corp.*, C.D. 4687 ---------- 22

Appealed to U.S. Court of Customs and Patent Appeals. Cross-appeals 77–16 and 77–17 dismissed August 12, 1977.

VOLUNTARY ENTRY (*see* AMERICAN GOODS RETURNED, C.D. 4692).

WEARING APPAREL (*see* VINYL SHOE UPPERS, C.D. 4687).

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American selling price—negotiated settlement—Parties reached a negotiated settlement of approximately 11,000 causes of action relating to dutiable value under section 402a(g) of the Tariff Act of 1930, as amended, on rubber sole canvas footwear. As to 128 consolidated causes of action that had been tried and submitted, the court held that the articles of footwear described by pattern number on the schedule attached to the stipulation filed with the court were properly dutiable on the basis of American selling price as defined in section 402a(g), Tariff Act of 1930, as amended, and that the proper value for each article was the value designated on the schedule by the column entitled "DUTIABLE VALUE (PER PAIR)." The parties agreed that plaintiff would abandon the remaining causes of action, which had previously been suspended under the consolidated action, and thereafter without further supervision or direction by the court, would mutually agree upon the American selling price valuation of each article of merchandise included in the remaining actions, pursuant to the terms of an independent and supplemental agreement, which had not been filed nor made a part of the proceeding. At the request of the parties, and in order to expeditiously and effectively process the determination of the appropriate valuations of the articles of merchandise in all of the causes of action, the court authorized the clerk of the court to transmit to the custody of the chief of the Customs Section, office of the Assistant Attorney General, upon request, the files of the court relating to the consolidated action, as well as the files of the other causes of action filed by the plaintiff and suspended thereunder. The court ordered that upon the final determination of the appropriate valuations in conformity with the terms of the filed stipulation and the independent and supplemental agreement, the chief of the Customs Section transmit directly to the customs official at the appropriate port of entry, the necessary papers and directives requisite to effect proper liquidation, and to thereupon promptly return to the clerk of the court the file of each cause of action. *Mitsubishi International Corp.*, C.D. 4703 162

Export value—burden of proof—On the record presented, the court held that the plaintiff had failed to meet its burden of proving that merchandise made by the same producer which was identical to the merchandise in question was freely sold or offered for sale for exportation to the United States at prices equal to the invoice prices. *Carmichael International Service*, C.D. 4700 143
Rehearing denied July 28, 1977.

Export value—fairly reflects market value—proof—Proof that price of merchandise exceeded production costs and generated a profit for seller is insufficient to prove export value. Proof of export value must derive from the export market to the United States. *D. H. Baldwin Co. et al.*, C.D. 4704 164
Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77–29.

Export value—loading charges—Loading charges are not charges which accrued subsequent to exportation of certain steel bars and therefore were properly included as part of the export value of the merchandise. *Kurt Orban Co., Inc.*, C.D. 4697 122
Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77–23.

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Export value—price fairly reflecting market value—The court held that the prices at which a foreign manufacturer sold merchandise to a selected purchaser for export to the United States fairly reflected market value within the meaning of section 402(f)(1)(B) of the Tariff Act of 1930, as amended, since the record showed (1) that the manufacturer-seller's prices to the unrelated selected purchaser at the primary level of distribution were equitable with the prices paid for the same merchandise by a purchaser at the third level of distribution; and (2) there was no evidence in the record that the dealings between the manufacturer and selected purchaser were anything but at arm's length and bona fide in all respects. Further, where, as here, a seller is the sole manufacturer in the country of exportation and makes sales for export to the United States exclusively to a wholly unrelated company without restriction as to the disposition or use of that merchandise in the United States, the price between the parties is the market value of the merchandise within the statutory understanding. *Ernest Lowenstein, Inc.*, R.D. 11779------ 169

Application for review filed by government.

Export value—price fairly reflecting market value—Where there was no evidence in the record of actual sales, or of offers of sale, of such or similar merchandise to all purchasers in the principal markets of the exporting country at the claimed f.a.s. [free along side (vessel)] prices within the framework of the export value formula set forth in section 402(b) of the Tariff Act of 1930, the court *held* that the plaintiff had not borne its burden of proof in rebutting the presumptively valid appraisements. Accordingly, the appraised values were affirmed, and the appeals for reappraisement dismissed. *Kurt Orban Co., Inc.*, C.D. 4697---------- 122

Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77-23.

Export value—such merchandise—Under the statutory provisions covering export value, consideration must be given to the value of "such" merchandise, i.e., identical merchandise produced by the same manufacturer, before consideration can be given to the value of "similar" merchandise. *Carmichael International Service*, C.D. 4700---------- 143

Rehearing denied July 28, 1977.

Fairly reflects market value—arms length negotiations—While proof of arms length negotiations may support a finding the price fairly reflected the market value of the merchandise, in this instance the manager of the exporting manufacturing subsidiary remained an employee of the parent importer and the requisite independence of action between the buyer and seller could not have existed. *D. H. Baldwin Co. et al.*, C.D. 4704 ---------- 164

Appealed to U.S. Court of Customs and Patent Appeals, Appeals 77-29.

Separability of appraisement—Various articles consisting of bent pipe, articulation joints and reducers were imported from Japan for installation in a pen stock system, i.e., a conduit for conducting water used in a power project. They were appraised at single unit values, net packed, on the basis of constructed value as defined in section 402(d) of the Tariff Act of 1930, as amended. Plaintiff did not dispute the basis of appraisement but alleged that the appraisements were separable.

The court *held* that the appraisements were not separable, as the various articles either were not separately invoiced or entered, or their appraised values were not separately listed. *Mitsubishi International Corp.*, C.D. 4686---------- 4

Separability of appraisement—Where an appraisement is expressed as a single individual unit, it is not on its face separable. It may, nevertheless, be constructively separable if there is evidence that the appraising officer, in fact, calculated the appraised value by adopting the specific amounts or charges shown on the invoices for the merchandise. Here, the required evidence did not exist as there was nothing in the record from which the court could determine for purposes of separability, which charges, or in what amount, they were utilized by the appraising officer in determining the appraised values of the merchandise. *Kurt Orban Co., Inc.*, C.D. 4697---------- 122

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MOTION TO COMPEL LIQUIDATION AND DETERMINATION OF PROTEST
Plaintiff moved to compel the defendant to liquidate all present and future entries of the involved merchandise, and further to act on any resulting protests within 15 days of receipt, in order for the court to obtain jurisdiction under 28 U.S.C. § 1582. The court held that the All Writs Act, 28 U.S.C. § 1651(a), grants power in aid of the court's existing jurisdiction under 28 U.S.C. § 1582, and does not give it the power to compel anyone to do those acts such as liquidation and denial of protest, which are a necessary prelude to the exercise of jurisdiction. Accordingly, the court denied plaintiff's motion. *Russell Stanfield Dexter*, C.R.D. 77–1 179

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91st Cong., 1st Sess. (1969) (*see* MOTION TO DISMISS FOR LACK OF JURISDICTION, C.R.D. 77–5).

MOTION
FOR SUMMARY JUDGMENT; CROSS-MOTION FOR SUMMARY JUDGMENT
Certain "Eskimo Doll Radios" were classified as dolls under item 737.20, Tariff Schedules of the United States, and were claimed to be classifiable as a solid-state (tubeless) radio receiver under item 685.23, or as an electrical article, not specially provided for under item 688.40 of the said tariff schedules. Plaintiff moved for summary judgment pursuant to Rule 8.2 of the Rules of the U.S. Customs Court, and defendant cross-moved for summary judgment pursuant to said rule.
The court held that the common meaning of the term "dolls" is a question of law and that the opinions stated in the affidavits in support of the respective motions cannot be given any probative weight. Accordingly, plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment were denied. *Fortune Star Products Corp.*, C.R.D. 77–3 184

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TO COMPEL LIQUIDATION AND DETERMINATION OF PROTEST (*see* JURISDICTION, C.R.D. 77–1).

Lack of jurisdiction (*see* JURISDICTION, C.R.D. 77–1).

TO DISMISS

Action; pleading jurisdictional defect in answer

Pursuant to rule 4.7(b) of the rules of this court defendant filed a motion to dismiss action for lack of jurisdiction. Plaintiff opposed motion alleging that, acting without counsel, it was misdirected by customs personnel in filing its protests, and that customs personnel delayed transmission thereof to district director.

The court denied government's motion without prejudice to asserting the jurisdictional defense in its answer, pointing out that the court would be ill advised to decline jurisdiction in the case if the allegations in the complaint relating to alleged deceptive and improper practices of customs officials in misdirecting and delaying the filing of the importer's protests can be given full credence. *Point Four Ltd., Inc.*, C.R.D. 77–4 ---------- 190

For lack of jurisdiction

(*see* MOTION TO DISMISS ACTION, C.R.D. 77–4).

Summons not timely filed

Pursuant to rules 4.7(b)(2) and 4.12 of the court defendant moved to dismiss action for lack of jurisdiction because of plaintiff's failure to timely file summons pursuant to 28 U.S.C., section 2631(a). Defendant had concluded that in view of the provisions of 19 U.S.C., section 1515, the failure of a customs official to either allow or deny a protest within a period of two years from the day of its filing constituted a constructive denial thereof, causing the 180-day time limitation to automatically begin running on the day immediately following the last day of said two-year period. By the time the summons was actually filed, defendant charged that a total period of 196 days had elapsed thus causing the filing of the summons to be untimely.

On the record presented and the legislative history, the court held that the mailing of a notice of denial is a prerequisite to the commencement of the 180-day time limitation period; that the delay in the mailing of the notice of denial in the instant case must be presumed to have been inadvertant; and that the summons was timely filed. Accordingly, defendant's motion was denied. *Knickerbocker Liquors Corp.*, C.R.D. 77–5 ---------- 192

PLEADING TO JURISDICTIONAL DEFECT IN ANSWER (*see* MOTION TO DISMISS ACTION, C.R.D. 77–4).

SOLID-STATE (TUBELESS) RADIO RECEIVER

ESKIMO DOLL RADIOS (*see* MOTION FOR SUMMARY JUDGMENT, C.R.D. 77–3).

SUMMARY JUDGMENT, MOTION FOR

FOOTWEAR

Plaintiff moved for summary judgment under rule 8.2 contending that there exists no genuine issue of material fact that requires resolution at a trial. The involved merchandise is footwear imported from Taiwan and classified under item 700.80 of the tariff schedules, as footwear with uppers of fibers other than vegetable fibers, and is claimed to be properly classifiable under item 700.70 of the tariff schedules as footwear with uppers of vegetable fibers.

The court held that the proper method of determining the chief value of the imported merchandise was to ascertain the costs of the separate component materials which include not only the basic material but work done on it to bring it to the point of assembly, and that plaintiff's proof was insufficient to establish the same. Accordingly, plaintiff's motion was denied. *Jimlar Corp.*, C.R.D. 77–2 ---------- 182

SUMMONS NOT TIMELY FILED (*see* MOTION TO DISMISS FOR LACK OF JURISDICTION, C.R.D. 77–5).

TIMELINESS

CUSTOMS OFFICIALS; ALLEGED MISDIRECTING AND DELAYING FILING OF PROTESTS (*see* MOTION TO DISMISS ACTION, C.R.D. 77–4).

WORDS AND PHRASES
CHIEF VALUE (*see* SUMMARY JUDGMENT, MOTION FOR, C.R.D. 77–2).
Of cotton (*see* SUMMARY JUDGMENT, MOTION FOR, C.R.D. 77–2).
COMPEL LIQUIDATION (*see* JURISDICTION, C.R.D. 77–1).
DEPRIVATION OF DUE PROCESS OF LAW (*see* JURISDICTION, C.R.D. 77–1).
DOLL (*see* MOTION FOR SUMMARY JUDGMENT, C.R.D. 77–3).
GENUINE ISSUE (*see* SUMMARY JUDGMENT, MOTION FOR, C.R.D. 77–2).
(*see* JURISDICTION, C.R.D. 77–1).
MAN-MADE FIBERS (*see* SUMMARY JUDGMENT, MOTION FOR, C.R.D. 77–2).
VEGETABLE FIBERS (*see* SUMMARY JUDGMENT, MOTION FOR, C.R.D. 77–2).

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